87-1582
No. _____

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM 1987

In the Supreme Court
OF THE
United States

FRANK BORING FITZGERALD,
APPELLANT,
vs.
STATE OF MONTANA, DEPARTMENT
OF FAMILY SERVICES,
GENE HUNTINGTON, DIRECTOR
RESPONDENT. 1/

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA 2/

JURISDICTIONAL STATEMENT

APPEARANCE: FRANK BORING FITZGERALD
3000 HALLOWELL LN
BILLINGS, MT 59101
406-259-5866
APPELLANT, PRO SE

1/ FORMERLY DEPT. SOCIAL & REHABILITATIVE SERVICES, DAVE LEWIS, DIRECTOR.
2/ CASE BELOW, 86-538, IN RE: MGM, YOUTH IN NEED OF CARE. 741 P2 770.

QUESTIONS PRESENTED

1. Wrong statutes used against Appellant in the beginning; Guardian Ad Litem sided with State, making Appellant and child adversaries.

2. The State and lower court went first to best interests of the child thruout this case, absent first find parent unfit.

3. Stay Orders and Decision on first appeal were disregarded. Appellate court found no evidence in record harm would come to child on visits or living with Appellant.

4. "Least restrictive" and other provisions of USCS Title 42-601 et seq., were disregarded: Appellant's child given a new name, a new religion, 300 mile distance, no visits and foster care for half her life.

5. Judge sat 1-1/2 years on State motion for a new trial denied by Appellate court in 2nd appeal.

6. Stipulation, put into place without court order, was in nature of a Bill of Attainder, and, in nature of Executory Contract Adoption.

7. Appellate court allowed "clear and convincing evidence" doctrine did not require full and fair trial but relied upon State evidence absent defense.

8. Infringement of Rights was not sufficiently drastic to invoke constitutional protections.

SUBJECT INDEX

Opinion below..... 1

Other opinions and decisions below.... 2

Jurisdiction..... 2

Table of authorities cited ii

Constitutional provisions and statutes involved.....iv,v,vi

Statement of the case..... 7

Reasons for granting this appeal..... 19

Questions presented..... 4

Argument 21

1. Wrong statutes used against Appellant in the beginning; Guardian Ad Litem sided with State, making Appellant and child adversaries.....4,21

2. The State and lower court went first to best interests of the child thruout this case, absent first find parent unfit.....4,29

3. Stay Orders and Decision on first appeal were disregarded. Appellate court found no evidence in record harm would come to child on visits or living with Appellant.....5,32

4. "Least restrictive" and other provisions of USCS Title 42-601 et seq., were disregarded: Appellant's child given a new name, a new religion, 300 mile distance, no visits and foster care for half her life.....5,38

5. Judge sat 1-1/2 years on State mo-

tion for a new trial denied by Appellate court in 2nd appeal.....6,42

6. Stipulation, put into place without court order, was in nature of a Bill of Attainder, and, in nature of Executory Contract Adoption.....6,46

7. Appellate court allowed "clear and convincing evidence" doctrine did not require full and fair trial but relied upon State evidence absent defense....6,50

8. Infringement of Rights was not sufficiently drastic to invoke constitutional protections.....7,51

Conclusion..... 62

Relief prayed for..... 63

AFFIDAVIT

CERTIFICATE OF SERVICE

Table of Authorities Cited

Cases

Fierro v. Ljubicich,
5 Misc.2d 202 (1957).....23,54

Kulko v. Superior Court of California,
436 US 84 (1978),
reh den 438 US 908.....3
Lehr v. Robinson, No. 81-1756
456 US 970 (1983).....38

Mathews v. Eldridge,
424 US 319 (1976).....43

May v. Anderson,
345 US 528, 533 (1953).....24

Meyer v. Nebraska,
262 US 390, 399 (1923).....24

Prince v. Massachusetts,
321 US 15, 166 (1944).....24

Santosky v. Kramer, No. 80-5889
455 US 745 (1982)..22,25,26,27,28,43,45,54

Skinner v. Oklahoma,
316 US 535, 541 (1942).....24

Stanley v. Illinois, No. 70-5014
405 US 645 (1972).....22,24

Lower Court Cases

DJ-79-188, In Re MGM.....23,26,40,48,52

Henderson v. Henderson,
568 P2 177 (1973).....48

In Guardianship of Aschenbrenner,
597 P2 1156 (1979).....48

In Matter of Doney,
570 P2 575 (1977).....48

In Re MGM, 654 P2 994 (1982) =
Mt.Sup.Ct. 81-523
(1st appeal)....21,22,25,28,33,40,43,53,62

ex rel Hanser v. 13th Judicial district
= Mt.Sup.Ct. 83-120 comes from In Re MGM,
DJ-79-188 (2nd appeal).....40,42,49,50,51

In Re MGM, 741 P2 770 (1987) =
Mt.Sup.Ct. 86-538
(3rd appeal).....21,22,26,51

Moore v. Fitzgerald, pat. disp.....9,ap139

U. S. Constitutional Provisions
.....ap134-138

Article I, Sec. 10,
Bill Of Attainder.....47,ap138

Amendment 1.....38,40,ap134

Amendment 5.....23,52,ap135

Amendment 6.....23,42,52,ap136

Amendment 7.....23,42,52,ap136

Amendment 8.....35,ap138

Amendment 9.....23,25,35,42,52,54,ap138

Amendment 10.....23,25,35,42,52,54,ap138

Amendment 14.....23,52,ap138

Montana Constitution
.....ap132-134

Article II, Section 15.....43,ap133

Separation of Powers.....49,ap134

Statutes, MT (MCA)
.....ap147-191

Title 40.....21,22,25,26,52,53,56,62

Uniform Parentage Act, 6-101 et seq..22,61

Chapter 6, Part 1.....23

40-6-109(1).....21,ap147

40-6-109(2).....21,ap147

40-6-112.....21,ap148

40-6-128.....25,61,62,ap148

40-6-130.....25,62,ap154

Title 41.....21,22,24,25,26,53,56,60,61,62

Chapter 3, Part 1.....26,33,37,49,60

Part 4.....60

Part 6.....33,49,60

Title 41, 41-3-101,et seq.....61

41-3-101.....37,56,ap156

41-3-102.....48,57,ap157

41-3-103(1).....22,ap163

41-3-103(1)(b).....41,ap164

41-3-103(1)(c).....22,ap164

41-3-401.....58,ap164

41-3-401(1).....58,ap164

41-3-401(7).....59,ap166

41-3-401(10)(a-d).....58,ap167

41-3-401(10)(d).....58,ap168

41-3-402.....59,ap168

41-3-403(2)(f).....59,ap172

41-3-404(4)(b).....59,ap173

41-3-406(5).....59,ap175

41-3-408(6)(d).....59,ap178

41-3-602.....59,ap179

41-3-603(4).....59,ap180

41-3-607(3).....59,apl82

41-3-607(4).....59,apl82

41-3-609(1)(c)(i).....59,apl83

41-3-609(3).....59,apl85

41-3-610(2).....59,apl86

41-3-1115.....60,apl87

"Abandonment".....46

"Potential adoption".....22

Statutes, US (USCS)

Title 25-1912(f).....25,apl90

Title 28-1257(2).....2

Title 28-2103(1).....3

Title 28-2254(a)(b)(c).....3

Title 42-601 et seq.....38,39,60

Miscellaneous

H.R. Rep. No. 95-1386.....25

United Nations Declaration of "Rights of the Child", November 20, 1959.....42

5 points of common law procedures to follow to reach best interests of the child.....29,30,61

Appendices

A...86-538 3rd appeal.....2,apl-12

C...Sept 2, 1986 Decision.....2,ap14-65

D...June 29, 1981 Decision.....2,ap66-77

E-A...81-523 1st appeal.....2,ap78-91

E-B...81-523 1st Stay Order.....2,ap92-93

E-C...81-523 2nd Stay Order.....2,ap94-95

F...83-120 2nd appeal.....2,ap96-97

G...Phillips Statement.....34,40,ap98-108

H...Birth cert substituted.....ap109-110

I-A...Van Dyk Report.....46,ap111-126

I-B...Earlier Van Dyk Report..46,ap127-131

J...Mt & US Cons quotes.....7,ap132-138

K...Case Flow Chart.....8,ap139-146

L..MCA-40,41, USCS-25 quotes..56,ap147-191

M...proof of fictitious name..41,ap192-193

N NOTICE OF APPEAL ap 194-195

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Frank Boring Fitzgerald, Appellant

v.

State of Montana, Department of Family Services, Gene Huntington, Director (Formerly, Department of Social and Rehabilitative Services, Dave Lewis, Director)

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

(Case below, 86-538, In Re: MGM, Youth In Need Of Care) (741 P.2d 770)

Frank Boring Fitzgerald, Appellant, respectfully petitions, his appeal be heard to review judgment of the Supreme Court of the State of Montana entered on August 20, 1987 and made final on September 17, 1987 by its denial of a petition for rehearing.

OPINION BELOW

The August 20, 1987, opinion (Mt.Sup.Ct.

86-538) of Montana's Supreme Court is found as Appendix A. The September 17, 1987, denial of petition for rehearing is found as Appendix B. The September 2, 1986, decision (DJ 79-188) of lower court, which formed the basis for appeal 86-538, is found as Appendix C.

OTHER OPINIONS AND DECISIONS BELOW

An earlier lower court decision, June 29, 1981, (DJ 79-188) is found as Appendix D. The December 9, 1982, opinion (81-523) of Montana's Supreme Court reversing that decision is found as Appendix E-A, and 2 stay orders on that decision are found at E-B and E-C. Montana's Supreme Court April 28, 1983 (83-120), denial of a Writ of Review or a New Trial to County Attorney is found as Appendix F.

JURISDICTION

For this appeal, jurisdiction of this Court is invoked under 28 USC Sec 1257(2),

because, Appellant was not afforded a full and fair hearing, required by the US Constitution; And, State statutes, and procedures, under which a partial hearing did take place, were repugnant to the Constitution; And, events have taken place thruout this case which are at variance with this Court's decisions.

Alternatively, Count one, if, this appeal does not lie to this Court, then the papers should be treated as petition for writ of certiorari pursuant to 28 USCS Sec 2103(1), as was Kulko v. Superior Court of California, 436 US 84, reh den 438 US 908.

Alternatively, Count two, if above two USCS statute sections do not invoke jurisdiction, because there are outstanding issues to be resolved in areas of 11 year retention of the child in foster care, lack of full and fair hearing, misapplication of law, the papers should be treated as petition for a writ of habeas corpus pursuant to 28 USCS Sec 2254(a)(b)(c).

QUESTIONS PRESENTED

1. Whether Montana Supreme Court erred in 81-523; again, in 86-538 when it declined to rehear on the issue raised therein; lower court and procedures erred allowing the State and court to unconstitutionally apply the wrong statutes to assume jurisdiction over Appellant in the beginning. To permit Guardian Ad Litem to side with the State, presuming Appellant and his child were adversaries contrary to decisions of this Court.

2. Whether Montana Supreme Court erred in 81-523; again, in 86-538 when it declined to rehear on the issue raised therein; allowing lower court to wrongfully go only to the best interests of the child from the beginning. To permit the State to enforce its view, supported by Guardian, of what constituted best interests of the child, absent first a finding of unfitness of Appellant contrary to decisions of this Court.

3. Whether in 81-523, Montana Supreme Court stay orders and reversing decision were disregarded by State, lower court, the Guardian Ad Litem, and the private agency, infringing Appellant's Constitutional Rights and harmful to his parent-child relationship. To permit Appellant to be deprived of due process and equal protection of law in view of Montana Supreme Court finding no credible evidence in record to indicate harm would come to his child if she lived with or visited Appellant, and then for the system to prevent even visits.

4. Whether Montana Supreme Court erred in 86-538 when it declined to rehear on the issue raised therein, allowing as harmless to the parent-child relationship, State or private agency non-compliance with USCS Title 42-601 et seq: Failure to recognize wishes of Appellant and blood relatives as to temporary "least restrictive" foster care; Appellant's child given

new name, new religion, 300 mile distance, no scheduled visits and foster care a total of 11 years; Failure to allow Appellant to sit on administrative foster care review committee.

5. Whether in 86-538, Montana Supreme Court erred when it declined to rehear on the issue raised therein, allowing as harmless to parent-child relationship, and to Appellant's Constitutional Rights, lower court judge failing to act for a year and a half on State's motion for a new trial, which new trial had previously been denied in 83-120 Mt.Sup.Ct.

6. Whether in 86-538, Montana Supreme Court erred when it declined to rehear on the issue raised therein, allowing as harmless, the Stipulation, being put into place without court order by the attorneys, was in the nature of an Executory Contract Adoption, in the nature of a Bill of Attainder.

7. Whether in 86-538, Montana Supreme

Court erred allowing as harmless, "clear and convincing evidence" doctrine of this Court does not require a full and fair trial at which an adequate defense is afforded, rather, unconstitutionally the court there relied exclusively on State evidence absent a defense.

8. Whether in 81-523, 83-120, and 86-538, Montana Supreme Court erred holding, in effect, infringement of Parental Human Rights was not sufficiently drastic to have invoked constitutional safeguards and protections at many points in this 9th year case.

MONTANA AND US CONSTITUTIONAL PROVISIONS, AND, MONTANA AND US STATUTES INVOLVED ARE CITED IN THE TABLE OF AUTHORITIES AND ARE PRINTED IN APPENDIX J, ap 132 , and L, ap 147 .

STATEMENT OF THE CASE

For a quick case overview the past 8-1/2

years, see Appendix K, ap 137 .

Appellant charged his Constitutional Rights were violated in those proceedings near the beginning. There have been many such violations.

In briefs, in and out of court, the State supported the Guardian and he supported the State. Doing so he pitted child against Appellant as adversaries.

Appellant maintains, foster care historical developments helped the State to forge new ways of separating child from parent. Ways not found in the statutes of Montana nor of the United States, nor of common law of this land.

According to official accounts, while in TIA foster care, precise examination of the child by a pediatrician, nothing was found to support original report used against the mother in TIA. Later, the original allegation was again directed at Appellant thru his two hired psychologists and a psychiatrist.

Long-term foster care was accomplished in the best interests of the child due to her mother's apparent mental illness. (That foster care placement discounted the American Indian blood line; the many blood relatives of the child, and the officially recognized godmother ready to take her into their homes on a temporary basis.)

The mother denied paternity acknowledgment and Moore v. Fitzgerald paternity dispute arose. The State became involved, unconstitutionally because there existed no specific statutory authority for the State to enter that private contest.

In the best interests of the child, the mother's Rights were terminated, by order of April 3, 1980. In that same order the judge unconstitutionally ordered the State to take all steps to place at issue in that case, the claim of Appellant to be the father in paternity dispute case.

The blood tests were run and proved 97.6% certain.

The State made the assumption, Appellant was the natural father (but not then adjudicated as such) but kept the child in foster care. Under those conditions, in regards to Rights of the child, that amounted to a violation of the 8th Amendment: Cruel and unusual punishment to the child for something it did not do.

The State then got approval of the judge for then putative father to unconstitutionally comply with stipulations requiring he submit to invasion of his privacy under color of law. The State was able to later change their specifications so as to be directable at putative father leading to further foster care.

State staff tried to show the child was afraid of putative Appellant. For this purpose, two visits were supervised in July of 1980 by an RN.

The State's intent was contained in the June 5th Stipulation #5: "...pending the termination of suitability of placement

with Frank Fitzgerald."

With the Guardian Ad Litem filing under Title 40 for termination, and the State under Title 41 for termination, consolidation of the two positions was granted over Appellant's objections. It was unconstitutional, following conclusive adjudication of paternity on November 17, 1980, to automatically put Appellant's Parental Rights on trial in the Title 40 best interests of the child. That was unconstitutionally required by Title 40.

It was unconstitutional for the Guardian Ad Litem to petition to terminate in consolidation with the State. That was a new form of double jeopardy. In the meantime, the child was examined by the same psychologist Appellant earlier hired to comply with court order of June 5, 1980. That expert told State staff in a confidential letter, the child, "would be an excellent candidate for adoptive placement", and, his findings the child was very bright and

adaptive might upset the procedures. Why? Because the State had at that time as its goal, "adoption" by the foster care providers who had signed adoption papers.

Appellant discovered in the file: "State's Report April 22, 1981 stated, "how soon can permanency be established for the child?" "Years - if father doesn't obtain custody he will appeal to state and federal" "Retain child in foster family." "Foster family has alcoholic problems."

Appellant's newly discovered evidence shows trauma of child abuse and neglect at hands of the State, causing emotional scars to Appellant's child later brought to bear on Stipulated visits, that foster mother today, divorced from her husband, gives an account of those days of terror (see Appendix G, ap 98). His child has foster care induced emotional scars brought to bear upon visits with Appellant in his family, because she cannot express herself to anyone else but her stepmother

who has known the child all of her life.

Hearings on the best interests of the child concluded with Appellant's Parental Rights terminated on June 29, 1981, not on unfitness to parent his child. Appeal 81-523 was a reversal and said it was error to terminate on best interests.

As to constitutionality question, on the last page of that June 29, 1981, Order, Paragraph #3: "Motion of Frank B. Fitzgerald to dismiss these proceedings on the ground Uniform Parentage Act (of Title 40) is unconstitutional is Denied."

Altho not specifically referred to as unconstitutional, application of Title 40 to Appellant, as Issue 1, was ruled error.

Stay orders and the reversing decision on appeal 81-523 had no effect on foster care circumstances, and, no effect on State's litigation.

After the first appeal, 81-523, the Guardian continued to pit child against

Appellant as adversaries.

Following issuance of the 1st remittitur, to avoid contempt of court, County Attorney fled to Mt.Sup.Ct. seeking a review or a new trial. Briefs he and Appellant filed in 83-120, said the judge was without jurisdiction to order a new trial.

The 83-120 remittitur did not get cross-referenced in lower court's file.

1-1/2 years later, the judge granted the State's motion and ordered up a new trial.

Whether new trial was constitutional or not, Appellant hired 2 more psychologists coordinated by a psychiatrist. Their favorable reports were not admitted into evidence only delivered to opposing attorneys under court ordered discovery. The psychiatrist's report to the court was entered into the court's file. It is found as Appendix I-A, ap 111 . Also see I-B, ap 127, by the same doctor 5 years earlier.

The judge refused to hear anymore of the

case instead he wanted a settlement or he would write a decision no one could appeal. That statement was heard out in the courtroom by Appellant.

A Stipulation in the form of an Executory Contract Placement very similar to an Executory Contract Adoption prohibited by common law of Montana, effectively a Bill of Attainder, was put into effect by the three attorneys without court order at the time. It permitted 2 three week visits with her own family. It called for the child to be examined by another psychologist and a psychiatrist, and the Guardian ad Litem, weekly.

The private agency having the child in foster care paid for the psychologist who reported to the Guardian. Only the direct observations of interaction effects would be permitted to be written into his report. Tho his report was not enough to return the child to foster care, the State did return the child to foster care with-

out benefit of the court's action.

In an attempt to get his child back into her own family, Appellant called the Guardian Ad Litem saying he read the report which said "some" impairment. "Substantial" impairment was required by the standard of the statutes to keep the child in foster care and terminate Parental Rights.

A contempt proceeding against the State and the Guardian failed largely because the Guardian's attorney got the psychologist to change his mind after the fact of the written report saying "some". He signed an affidavit saying "substantial impairment", even tho not specifically committed by act of commission or omission of Appellant. This was testified to at a later hearing. It was enough at the time to retain the child in foster care again without the court's action.

After the fact of the child going back into foster care, the Stipulation order

was signed by a judge, in effect, making it in the nature of, and similar to, an ex post facto law.

A secret hearing on question of discovery was held March 8, 1985, in which on the record the judge as much as called Appellant a criminal, and, he was not to be informed of this secret hearing nor its content until he called up the transcript on final appeal. And, any in camera produced documents were to be kept from Appellant in attorney's files only. If Appellant had known at the time what was going on without his knowledge, the Stipulation would never have come about. Unconstitutionally, this knowledge was kept from him so as the Stipulation could be put into place leaving the child in temporary foster care for the remainder of her childhood. Appellant's attorney confessed he thought the child was better off in foster care and if not signed, the child would be immediately returned to foster

care.

That background info did not appear in final appeal briefs. So Mt.Sup.Ct. said, in effect, the only reason its first decision was issued was so lower court could give the State a second chance to terminate. That went only to the best interests of the child.

Those briefs did not tell of the denial to County Attorney of his request for a review or a new trial in 83-120 Mt.Sup.Ct. Petition for Rehearing.

A personal prayer to Mt.Sup.Ct Chief Justice, dated September 23, 1987, pointing to new and significant evidence, (see Appendix G ap 98), asked for time to evaluate it, and a stay order, drew no reaction and none is expected. Therefore, Notice of Appeal to the US Supreme Court was filed October 1, 1987 and served on all parties in interest.

While the child was in foster care, the State violated federal laws under color of

state law:

Mail to the child was interferred with. There was no restraining order concerning the child receiving mail; and,

The child was taken across state lines at least 4 times without any court order contemplated in 41-3-103(1)(b), MCA (1985). The foster care providers in 2 previous summer are known to have said they would take her to Canada; and,

Provisions of USCS Title 42-601 et seq. have been violated in regards "least restrictive" foster care placement; failure to respect family wishes as to foster care placement; failure to provide the opportunity for Appellant to sit on foster care Review panel; and intent of Congress on returning foster care children to their parents.

REASONS FOR GRANTING THIS APPEAL

The decision 86-538 Montana Supreme Court is in conflict with United States

Statutes and decisions of this Court on the questions raised.

This case presents unique ways to retain a child in the hands of the State.

Foster care is effectively detention of the child in State hands with no practical way for Appellant to extract her from the system. This is color of law without regard to Constitutional Rights, Civil Rights, or most importantly, Human Rights.

The lower court refused to follow the remittitur of its appellate court and make further findings, instead it ordered a new trial, denied above, and then instructed the parties to settle.

Courts cannot make law, only the legislature can. Nowhere in statutes is there to be found the matter of a Stipulation requiring Appellant's child be detained in foster care witout first complying with his Constitutional Right to a full and fair trial.

ARGUMENT

1. WRONG STATUTES USED AGAINST APPELLANT IN THE BEGINNING; GUARDIAN AD LITEM SIDED WITH STATE, MAKING APPELLANT AND CHILD ADVERSARIES.

Montana's Supreme Court erred, and its actions unconstitutional, by its not recognizing, the State and lower court applied the wrong statutes[1] to assume wrongful jurisdiction[2] over Appellant in the first

---

1/ See 81-523 Opinion Mt.Sup.Ct. Uniform Parentage Act of Title 40, MCA, was used against Appellant by Guardian Ad Litem seeking termination of Parental Rights. Abuse and neglect of Title 41 was used against Appellant by the State seeking termination of Parental Rights. The State supported the Guardian Ad Litem in his action and he supported the State in their action. Jointly they succeeded at consolidation, later ruled err and the Guardian had no standing to bring such action.

2/ See P38, Par."L" of Amicus Curiae Brief in support of Petition for Rehearing, Mt.Sup.Ct. 86-538, Sept. 1, 1987: "While Title 40, Chapter 6, Part 1 was the part, Section 40-6-112, Appellant relied on to get his paternity claim action undertaken by jurisdiction of the court under 40-6-109(1), subsection (2) therein did not, at that time, apply because the blood tests had not been conducted. Court's personal jurisdiction of Appellant Section 40-6-109(2), did not occur until not only the blood tests were conducted but adjudicated. Which adjudication resulted in its order of November 17, 1980, 9 months later. Following adjudication conclusively establishing "putative" father seeking blood tests, as "natural" father, Section 40-6-109(2) personal jurisdiction then

place in 1980.

The State automatically presumed Appellant, an unwed father, and his child were adversaries.[3] The State automatically challenged and presumed[4] he was unfit to parent absent the prerequisite proper hearings which could lead to conclusive jurisdictional decision of unfitness.

Appellant's Rights were violated at an early stage (1980) in this the 9th year of the case. Misapplication of statutes,[5]

---

occurred." Leaving open a TIA, if applicable then, under Title 41 where jurisdiction would take place under Section 41-3-103(1). 41-3-103(1)(c) could not have applied to Appellant during putativeness because he, under circumstances of the situation at that time, could not have been directly involved in father-child neglect or dependency alleged."

The State and the Guardian Ad Litem even went so far as to pull a "potential adoption" as a reason to terminate Appellant's Parental Rights. This was rejected by Mt.Sup.Ct. 81-523 appeal.

The State preferred to substitute a right to due process for the right to parent a child in an automatic challenge.

3/ Violates meaning of Stanley v. Illinois, 405 US 645 (1972) and Santosky v. Kramer, 455 US 745 (1982).

4/ such automatic challenge is proscribed by Stanley v. Illinois, supra.

5/ Title 40 Parental Rights termination procedures.

specifically being referred to as unconstitutional, was an issue raised by Appellant early on (1981). From Appellant's brief of June 1981 filed with lower court before its decision, the following is quoted[6]:

> "Evidence produced at trial was nothing more than speculation. To terminate Mr. Fitzgerald's parental rights based upon said evidence would be to deny his constitutional right to due process and would render application of Uniform Parentage Act (Title 40, Chapter 6 Part 1, MCA), in this particular case, a violation of Mr. Fitzgerald's constitutional rights."7/ ins.add.

Text of the brief went on to say:

> "The language found in the decision of Fierro v. Ljubicich, 5 Misc.2d 202 (1957) summarizes the test to be applied in cases of this nature:
> 'The fundamental principal (is) no Court can, for any but the gravest reasons, transfer a child from its natural parent to any other person, since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the

---

6/ June 1981 Brief In Support Of Position Of Frank B. Fitzgerald, DJ-79-188.

7/ 9th and 10th Amendment Rights reserved in the people--6th and 7th Amendment Right to a fair trial--1st Amendment Right to determine religion for one's family--5th and 14th Amendment Right to due process.

reach of any Court.'"8/ ins.add.

Earlier (October 1980), Appellant filed a Motion to Dismiss and Objection to Consolidation with lower court stating:

> "Since the State has privously filed an 'Abuse and Neglect' Petition (under Title 41, MCA), the rights of Frank B. Fitzgerald would be infringed upon if he was forced to not only defend his position in that action, but simultaneously deal with the Petition of the Guardian Ad Litem (who illegally filed to terminate father's parental rights under Ti-

---

8/ This Court has adhered to this principle in many decisions. For example, in Stanley v. Illinois, supra, this Court stated: "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', Meyer v. Nebraska, 262 US 390, 399 (1923); (are) 'basic civil rights of man', Skinner v. Oklahoma, 316 US 535, 541 (1942); (are) 'rights far more precious. . .than property rights', May v. Anderson, 345 US 528, 533 (1953)." "'It is cardinal with us, the custody, care and nurture of the child reside first in the parents, whose primary function and freedon include preparation for obligations the state can neither supply nor hinder', Prince v. Massachusetts, 321 US 15, 166 (1944)."

The gravest reasons doctrine suggests, cases involving alleged child abuse, neglect or dependency of Title 41, MCA, should be given far greater procedural safeguards than is presently afforded. Civil Parental Rights termination proceedings should give way to criminal proceedings where far greater safeguards are afforded by tradition. So much has been wrong in this case and thousands like it as to be beyond the scope of this Presentation.

tle 40)".9/ ins.add.

Appellant again raised it, by implication, on appeal Issue 1 answered in Mt.-Sup.Ct. opinion (81-523) which stated:

> "Appellant claims 40-6-128 and 40-6-130, MCA, should not have been applied to him, and District Court therefore erred by terminating his parental rights absent any findings of abuse or neglect. We agree and remand for further findings."10,11/

This Court has touched briefly upon question of civil versus criminal procedures in termination cases: "...in the Indian Child Welfare Act of 1978, 25 USC 1912(f), Congress requires 'evidence beyond a reasonable doubt' for termination of Indian parental rights, reasoning that 'the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty...' H.R. Rep. No. 95-1386, p.22 (1978)." Santosky v. Kramer, 455 US 745 (1982). It is not so much a question of evidence as procedural and Rights safeguards.

"The right of a parent. . .a fundamental one" doctrine suggests a confirmation of Rights reserved in the people causes of the 9th and 10th Amendments.

9/ Illegality of Guardian's action to seek termination of Parental Rights was confirmed on appeal (81-523).

10/ Opinion (81-523) ruled: "Section 40-6-128, MCA, did not give Guardian Ad Litem right to petition for termination of appellant's parental rights." "District court erred by consolidating Guardian's petition with that of SRS (the State)". ins.add.

11/ The State filed its civil allegations under Title 41, MCA, and with the Guardian Ad Litem un-

Appellant again raised it, by implication, on appeal Specification of error No. 4 (86-538):

> "The trial court used the 'best interests of the child test' for determining custody of the minor child."12/

The record in this case fails to reflect the whole truth, the whole story. It does not reflect what the State tried in its zeal to win and conceal.[13] In a word,

---

der Title 40, consolidation of these two positions ruled illegal, Constitutionality of any and all procedures are challenged.

Misapplication of statutes, said to be unconstitutional by Appellant, was denied by 1st judge's DJ-79-188 June 29, 1981 Order: "3. Motion of Frank B. Fitzgerald to dismiss these proceedings on the ground Uniform Parentage Act (Title 40, Chapter 6, Part 1, MCA) is unconstitutional is denied." ins.add. Upon reversal by appeal, that issue was again alive and the new judge could have, as further findings, ordered by the remittitur, determined the misapplication of the statutes was unconstitutional and he could have ordered the case dismissed as prayed for originally.

12/ "best interests" does not follow Title 41 but Title 40, previously ruled err.

13/ Appellant's child has belonged to a stranger, parens patriae, by force and effect of law, under color of law.

In Santosky, supra, this Court recognized the importance of safeguards and what the State could do given the right circumstances of a case: "...the primary witnesses (for the State) at the

Appellant was set up--to fit State's plans already in place--to maintain the child in foster-care without termination of Appellant's Parental Rights but allowing occassional visits.[14]

Montana's Supreme Court erred, and its actions unconstitutional by its not recognizing, the State and lower court wrongfully permited continuation of the Guardian Ad Litem to side with the State in con-

---

hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the state even has the power to shape the historical events that form the basis for termination."

Striking observations in Santosky point up problems the State presents to parents in civil proceedings to terminate, such as "double jeopardy", which, in effect, is what happened after the State lost in a reversal in Montana's Supreme Court and a new judge ordered a new trial, even in face of its denial by the high court.

14/ State's plan was reveal several years ago in a conversation between Appellant and George Bulatowicz, case social worker. Appellant did not at the time take seriously the State trying to parallel parens patriae with Parental Rights. Without access to State secrets (most of discovery was denied), Appellant had to clandestinely learn of State's actions behind the scenes.

solidated proceedings,[15] and for him to act from the beginning as second prosecutor with ability to freely challenge the parent-child relationship in adversity as if parent and child were adversaries contrary to this Court's common law holding, the State may not adhere to the premise the parent and child are adversaries until the court first finds the parent unfit to parent.[16]

There is little or no difference between consolidated proceedings where Guardian Ad Litem and the State are co-prosecutors and proceedings not so labelled consolidated in which co-prosecution exists on a practice of application.[17] Thus, Appellant was

---

15/ Consolidated proceedings were declared error in Opinion 81-523 Mt.Sup.Ct.

16/ Santosky, supra, took note of significance of New York law, stating: At factfinding, the State cannot assume a child and his parents are adversaries..." "But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."

17/ This has been the truth of this case. It is obvious from a reading of every brief ever filed by the State and Guardian Ad Litem.

denied a Constitutional Right to a fair trial from the beginning and thruout this 9th year case.

2. THE STATE AND LOWER COURT WENT FIRST TO BEST INTERESTS OF THE CHILD THRU-OUT THIS CASE, ABSENT FIRST FIND PARENT UNFIT.

The many decisions of this Court call for 5 points in common law to be followed by the courts in the trial of the first instance. Additionally, common law of this Court has called for that trial to be bi-furcated into hearings first on parent, or parents, then on the child. That amounts to first find the parent, or parents, un-fit to parent, then go to the best inter-ests of the child, not the other way around.

The 5 points in common law are: lst, a full and fair evidentiary hearing must be afforded each parent on a lawful State challenge to a given Parent's Rights. It is not correct to hear evidence at the

trial of the parent on the best interests of the child. 2nd, if that parent is found by "clear and convincing evidence" to be unfit to parent, then terminate that parent's Rights. 3rd, if that parent's rights are terminated and if there is a lawful challenge to the other parent's Rights, repeat points 1 & 2 for the other parent before moving on to point 4. 4th, hear evidence on the best interests of the child only after both parents are terminated. 5th, decide what are the best interests of the child and implement that decision.

On points 1, 2, & 3, the Guardian Ad Litem's duty to the child as his client is to guard the child's Rights to its parent from encroachment by the State. Then on points 4 & 5 to actively participate as an adversary to the parents in his client's best interests.

Montana's Supreme Court erred, and its actions unconstitutional, by its not rec-

ognizing, lower court went only to the best interests of the child in the first place[18] and permitted the State, thruout this 9th year case, to enforce its view of what constituted best interests of the child and that the State view can prevale, even absent the prerequisite proper hearings leading to conclusive jurisdictional decision of parental unfitness.[19]

By its actions Montana's Supreme Court gave unconstitutional approval to State placement of the child in continuous 11 year temporary foster-care, a violation of the child's rights to be parented by a parent, a violation of federal law[20] and intent of Congress.[21]

18/ The termination of maternal Parental Rights are not challenged here alto there is much to complain of in her termination.

19/ Whether by the expression "best interests of the child" or by any other phrase, the meaning is the same; subversion of Parental Rights by the judge with the State and the Guardian joining in.

20/ State of Maryland complied with federal law and devised programs to return children to their families.

21/ Intend of Congress was to establish programs assisting return of foster-care children to their natural families soon as possible after removal.

By its actions it gave unconstitutional strategic approval to State's presumption, State ordered foster-care placement would have been jeopardized and against best interests of the child if parental interference in that placement succeeded thru his litigation, his visits, his desires to be family, and blood relatives desires they be family, all, said to cause the child to be dependent and a "youth in need of care", thereby.[22]

3. STAY ORDERS AND DECISION ON FIRST APPEAL WERE DISREGARDED. APPELLATE COURT FOUND NO EVIDENCE IN RECORD HARM WOULD COME TO CHILD ON VISITS OR LIVING WITH APPELLANT.

Stay orders are intended to prevent enforcement of a court decision and orders which issue as a result of that decision.[23] In this case, two Mt.Sup.Ct. Stay

---

22/ The youth has been and is to be so, in need of care, only because of being in hands of the State for 11 years.

23/ State and private agency actions suggest otherwise. "Civil" stay orders can be ignored?

Orders and its Reversal Decision were violated by both the lower court and the State.[24] It can be seen, the State and the private agency proceeded as if no Stay Orders or Reversal Opinion were issued. The child was given to the private agency having a very loud voice,[25] Moved 300 miles, given a new name, a new religion and it has been that way ever since.[26]

Mt.Sup.Ct Opinion reversed those lower court orders but the proper events flowing from those reversed orders never came about. Not only was that contemptous but unconstitutional.

24/ But can the State, the lower court, and the private agency ignor a reversal by Mt.Sup.Ct.?

25/ For years after 81-523 reversal, nothing changed.

With $400 million in assests, the private agency was heard all the way into the Governor's mansion and into the halls of the legislature where they adopted into law, Title 41, Chapter 3, Part 6, as a parallel to or as a substitute for any sections of Part 1 ruled unconstitutional. It was a pet project of a state senator, who at the very same time was the private agency's legal representative.

26/ It violate nearly all provisions of the Constitution designed to protect people's Rights from encroachment of this kind.

Long before Montana's Supreme Court Stay Orders and its Opinion reversed lower court, his child was unconstitutionally detained as a ward of the State, because, it was alleged, detention in foster care was in the child's best interest. That flies in the face of the fact the child was put into an environment far worse[27] than anything Appellant could possibly have provided or by any of the child's many blood relatives willing to assume temporary responsibility or the duly appointed "godmother",[28] ready, willing and able to assume that responsibility. The presumptive reasons of the State and the court for detaining the child in foster care, said to be in its best interests,

---

27/ For the tragedy of the child's first foster care providers, see Appendix G, the Phillips Notarized Statement about the child's experiences.

28/ A duly appointed "Godmother" was status of a person known to the child all of its life, admitted to by both the State and the Guardian Ad Litem.

are just not real.[29] Detention of Appellant's child in foster care for 11 years, 8 years in private agency hands constitutes cruel and unusual punishment for the child[30] within the meaning and intent of the 8th Amendment.

Because of that detention, the child[31] will not know depth of love, kindness, affection, concern, emotions, humanity, and right from wrong.[32]

Because of that detention, certain genetic factors the State was fully aware of, were not timely attended to and Appellant was prevented from fulfilling his paternal responsibilities[33] to his child to see those factors were timely attended

---

29/ These notions exist in symbolic language and headstrong ideas of some social workers who support a system which could be described as a carbon copy of Nazi Germany, lebensborn.
30/ And for the parent.
31/ Deprived thereby of equal protection of law.
32/ Especially the depth possessed of its natural father who loves his child more than life or any property and who has spend his life's savings and much of those of his family on this most important issue of wrongful detention.
33/ 9th and 10th Amendment Rights reserved in the people.

to as needed. Thus, the child has suffered while in the hands of the State and the private agency.[34]

Appellant is a scientist,[35] adhering to scientific priniciples and attitudes. Following in the family tradition, he should have been able to pass on his knowledge to his child, knowing the child would be able to understand this knowledge. Acceptance of ideas, family tradition, knowledge, philosophy, religion and all of the other attributes of human development largely depend on the environment the child finds itself in. Appellant's child cannot learn its father's ideas while totally alienated from him in foster care devoted to vastly

---

34/ To what extent the child has suffered is already apparent, cite the outcome of two 3 week visits.

And to what greater extent may not become certain until the child eventually has a family and children. The State blames the parent--the parent blames the State.

35/ He is a charter member of The Planetary Society, holder of the Bausch and Laumb Honorary Science Award, has contributed to society in the field of radio-communications, and holds an Honorable Discharge from the US Army.

different ideas.[36]

Compare, Appellant has a large library of videos, many on science, on meaning of the universe, the planets, the stars, the blade of grass, the grain of sand, animals in the wild, mating calls of birds, songs of hump-back whales, computers, food-chains, and so much more to learn,[37] compare that, with, "they don't even have a TV set" but have rows of folding chairs in their living room for follow travelers in fundamentalist prayer service.[38]

And they never hug one another.[39] The child is even denied that most important

---

36/ MCA Title 41, Chapter 3, Part 1, 41-3-101 states the Declaration of Policy of the state of Montana and they include natural families where possible. It is Appellant's statement he was denied the possibility of any family with children as a direct result of unconstitutional actions of the State interference into his family. Appellant wants children in his family, to be free to raise a family, without some sort of reversal he will have to emigrate.

37/ He knows library research also.

38/ This religion is not Appellant's nor any of his family.

39/ Hugging is the best way for humans to transmit non-sexual signals of love, devotion, and affection.

quality of human togetherness.[40]

As surely as if the child were in a reformatory, foster care cannot provide the stuff of life the child requires and deserves.[41] This is so because of State's unconstitutional intervention into its childhood, effectively punishing it over State's fraudulent automatic allegation against the father, "he is unable to provide proper care and supervision".[42]

4. "LEAST RESTRICTIVE" AND OTHER PROVISIONS OF USCS 42-601 ET SEQ. WERE DISREGARDED: APPELLANT'S CHILD GIVEN A NEW NAME, NEW RELIGION, 300 MILE DISTANCE, NO VISITS AND FOSTER CARE FOR HALF HER LIFE.

Pursuant to order of the court June

40/ Some State staff on this case feel contrary. Some have felt, as a general principle, hugging conveys sexual expressions.

41/ Parens patriae is but a stranger without ability to either create nor sever genetic and human bonds we all require on this planet as human beings to survive. Meaning derived from Lehr v. Robertson, US Supreme Court No. 81-1756 (1983), p12 lines 18 & 19: "The actions of judges neither create nor sever genetic bonds."

42/ Automatic allegations requiring child in long-term foster care violates nearly every US Supreme Court case on such subject.

29, 1981 terminating Appellant's Parental Rights in the best interests of the child, reversed on appeal, Appellant's child was given to the State who gave her to a private agency on or about October 1981.

After two appeals of benefit to Appellant Rights, another court order, September 2, 1986, disregarded those Rights and assigned the child foster care until she is 18.

Provisions of USCS Title 42-601, et seq. became operative when the State accepted matching funds for foster care of Appellant's child. Due to way this case was handled, "Least restrictive" provisions have been disregarded under color of law.

The child was moved 300 miles to isolate her in permanent foster care, from all blood relatives, godmother and friends. She was forced to accept yet another religion. Trauma was inflected. At one point, as she grew older, she viewed her situation as a "prison".

Montana's Supreme Court erred, and its actions unconstitutional, by its not recognizing, the State, by circumstances of the case, was able to permit and to cause production of, and utilization of, case historical developments detrimental[43] to the parent-child relationship thru close State, private agency, and foster care provider control of the child.

The State maintained this close control in full view of Mt.Sup.Ct. Stay Orders[44] and reversing Opinions,[45] and the 1st Amendment Right of a parent to decide the child's religion.[46]

43/ See Phillips notorized statement, Appendix G, for historical developments detrimental to the parent-child relationship. The 1st fostercare mother has come forward to reveal a trauma Appellant's child suffered while in the hands of the State.

44/ Mt.Sup.Ct. 81-523 Stay Orders April 15 and May 13, 1982 staying DJ-79-188 decision giving Appellant's child to SRS in her best interests absent prerequisite finding of Parental unfitness.

45/ Mt.Sup.Ct. 81-523, 654 P2 994, "District Court judgment is reversed and remanded for further findings", and 83-120 denial of petitions of County Attorney, April 28, 1983.

46/ Religious Right was recognized by SRS. Former Department of Social and Rehabilitation Services had policy guidelines which directed, foster chil-

Blood relatives had no say in the foster care placement. They were not consulted nor were their recommendations honored.

As to other federal laws disregarded, the private agency bought her airline tickets in a fictitious foster care name. (See Appenix M.) The agency tried to obtain driver's education for her in that name, but school officials refused, admitting her only in her legal name. She was registered twice in a hospital in that name. Admitted to public school in that name. Took her across state lines 5 times in that name without the necessary state court order contemplated in MCA Title 41-3-103(1)(b).

Father was not permitted to sit on a foster care review panel. He was not offered a "treatment plan" designed to keep father and child together. But was offered an invasive plan to permit further gather-

---

children shall be assigned to foster care provider families with the same religion as the religion of the child's natural family.

ing of data for use in court against the parent-child relationship. That invasive plan was objected to by Appellant's attorney.

Intent of Congress to return children to their homes was disregarded.[47]

5. JUDGE SAT 1-1/2 YEARS ON STATE MOTION FOR A NEW TRIAL DENIED BY APPELLATE COURT IN 2ND APPEAL.

Montana's Supreme Court erred, and its actions unconstitutional, effect holding harmless, lower court judge sitting on the case for over 1-1/2 years without his acting timely on State's motion for a new trial, which trial Mt.Sup.Ct. denied in ex rel Hanser v. 13th District Court, 83-120.

This delay infringed Appellant's Constitutional Right to a speedy trial[48]

47/ Right of a child to be parented by its parent is by implication, a Right reserved in the people assured by the 9th & 10th Amendments. It is also a Right recognized by all nations and is set forth in the United Nations Accord on "Rights Of The Child".

48/ Right to a speedy trial is assured by the 6th & 7th Amendments.

or to a summary judgment in his favor.[49]

If the State sought new trial was constitutional, which Appellant claims is unconstitutional in this case, he was unconstitutionally denied a full and fair hearing.[50]

49/ Summary judgment was possible given terms of Mt.Sup.Ct. 81-523 Opinion Reversing And Remanding For Further Findings.

50/ The judge heard the challenge from the State. However, he did not hear the challenge from the Guardian Ad Litem who was prepared to call a list of witnesses aimed at termination, siding with the State as a 2nd prosecutor. This disregarded the Santosky principle of the State cannot assume a child and parent are adversaries until parent found unfit; and Santosky risk of error principle.

From Santosky, citing the 1st of the Eldridge factors--the private interest affected, "The fact-finding does not support--and is not intended--to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents." Santosky v. Kramer, supra at p13 of 80-5889. (Contrast that statement by this Court with one used by GAL in his briefs where he wrongly alluded to Montana Constitution Article II, Section 15, when he said, "It is obvious, based upon the cited statutory and constitutional authority, a youth in the state of Montana has a right to seek his or her own safety, health and happiness in as adequate an environment as is reasonably available.")

It can be seen from Santosky and many others, a hearing pits the State directly against the parents. It is unconsciencable for the GAL to auto-

One can waive certain application of Rights, one can even waive certain Rights themselves. Not all Rights can be so waived. The Right to be a free person cannot be waived in favor of slavery or death. This is so because certain Rights are not only reserved in the people but are fundamental Human Rights challengable only by the strictest of rules of procedural due process safeguards and correct judicial conduct. Such was lacking in this case when the judge chose to hear the challenge but not the defense.

An indecisive judge,[51] he opt for a settlement because he could not balance Rights of Appellant against parens patriae. This acted against fundamental fair-

---

matically side with the State; to present his version of a 2nd prosecution packing the record. Such has been the situation here in the 13th state judicial district with his monopoly on GAL assignments.

51/ The judge was indecisive; it took him 1-1/2 years to grant the State's motion for a new trial. Apparently, he could not make a decision on basis of a "cold" record, which coldness he was responsible for.

ness.[52]

> "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." "The fact that important liberty interests of the child. . .may also be affected. . .does not justify denying the natural parents constitutionally adequate procedures." Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit has broken down..."53/

To do so is to relinguish Appellant's Right to a full and fair trial[54] and the judge to relinguish his personal jurisdiction of Appellant over to a private agency to implement their view of visits.[55] These

---

52/ To fail to provide adequate procedural safeguards is color of law.

53/ Santosky v. Kramer, supra, a p7 of 80-5889.

54/ Appellant has never relinguished his Right to his child. The purpose of any constitutionally authorized State challenge to that Right must include a full and fair trial to a conclusive determination as to parental unfitnes and the termination of Parental Rights or dismiss the case. Parental Rights are Human Rights to be freely exercisable or terminated by rule of law.

Trapping of Appellant and his family in those unusual circumstances of the case they found themselves in at the time has resulted in disregard for their fundamental Human Rights under color of law.

55/ the judge has not acted on submitted visitation proposals he asked for over a year ago. Any, visits are now the arrangement at the pleasure of

were done in the name of best interests of the child thru the eyes of the State and the private agency.[56]

As to what if? What if a new trial were to have been finished with an adequate defense as well as challenge? Would the results have been the same? Appellant does not have to answer one way or another, but, he was prepared with many witnesses including experts in many fields to provide testimony a full and fair trial was required to hear.[57]

6. STIPULATION, PUT INTO PLACE WITHOUT COURT ORDER, WAS IN NATURE OF A BILL OF

---

the private agency who prefers visits take place only twice a year. If visits cannot take place in less than 6 months, that constitutes abandonment subject to permanent custody in private agency.

56/ Largely because the judge has refused to act on visitation.

57/ A full and fair hearing, if constitutional, would have admitted into evidence crucial defense expert reports and testimony. See Appendix I-A & I-B as examples of such expert reports, of many. 2 others were forced into the hands of the State and GAL under discovery. They were favorable to defense but never used in court nor did they play any part in the judge's decision who refused to allow them into the record by his demand for a settlement.

ATTAINDER, AND, IN NATURE OF EXECUTORY CONTRACT ADOPTION.

Montana's Supreme Court erred, and its actions unconstitutional, when it declined to rehear its opinion when, among others, the question was raised, the Stipulation ordered by lower court[58] was in the nature of a Bill of Attainder in violation of Article I Sec. 10 of the U.S. Constitution.[59] It was in the nature of an Executory Contract Placement nearly identical to an Executory Contract Adoption prohibited by a trilogy of state supreme

---

58/ After the fact taking the form of ex post facto.

59/ Montana statutes do not provide for a Stipulation to be a pseudo-termination to take the place of relinguishment or findings of unfitness because of abuse, neglect or dependency. The court's requiring a settlement later to take the form of the Stipulation was the making of law (enactment of which is a legislative act) by the court. The Stipulation labelled Appellant as one the target of the Stipulation and effectively directing a verdict of guilt without trial of the first instance at which trial Appellant could, if evidence so indicated, be found guilty or not. Documentary labelling one guilty without a due process trial takes the form of a Bill Of Attainder, by definition.

court cases[60] holding such Contracts were prohibited and which cases cited only two ways in the statutes to terminate Parental Rights: Relinguishment; or, finding the parent guilty of abuse, neglect, or causing dependency.[61] Appellant has never agreed to relinguishment under any circumstances.

Effect of allowing the Stipulation to

60/ Trilogy of Mt.Sup.Ct. cases eluding to the only two statutory procedures to end Parental Rights: Henderson v. Henderson, 568 P2 177 (1973); In Matter of Doney, 570 P2 575 (1977); In Guardianship of Aschenbrenner, 597 P2 1156 (1979).

61/ It would be a factual dispute if anyone says Appellant agreed via the Stipulation to one or both statutory methods of termination. It is clear from the Order DJ-79-188 of September 2, 1986, Appendix C, pages 6 & 7, paragraphs 3, 4, & 5, and from a reading of Mt.Sup.Ct. appeal and Opinion, altho Montana's Supreme Court found no reason to doubt the lower court applied 41-3-102, MCA, simply because the trial of the first instance was not a full and fair and evidence was one sided due to lack of proper procedures which granted only a prosecution, at no time was Appellant's Parental Rights conclusively terminated. Absent termination of Parental Rights by due process, he was only de facto said to be guilty of abuse, neglect or dependency which in and of itself, given the circumstances of a conclusive due process trial determination of guilt, by statute requires the termination of Parental Rights. Therefore he has not been declared unfit to parent his own child. The holding of his child in foster care now and into the 11th year is unconstitutional.

stand, is to create a new extra-statutory 3rd class of Parental Rights termination proceedings which creation violates separation of powers clause.[62] [63]

Additionally, the Stipulation came about as a result of a new trial which new trial was denied to County Attorney by Montana's Supreme Court in 83-120.[64] The lower

---

62/ Montana's Constitution adheres to the separation of powers.

63/ Another effect of allowing the stipulation to stand, is to permit the adoption of Appellant's child by strangers without further hearings to terminate his Parental Rights under a scheme of labeling his ineffectual Parental Rights and his permitted minimal visitation, directably less than permitted by Montana statute definition of abandonment all as causing dependency fitting that definition.

If the argument were advanced, there is always another Part, 6, to Chapter 3, Title 41 under which Appellant's Rights are assured, this Court should be aware, no matter how seemingly protective of Rights Part 6 is said to be, the fact remains, Part 6 was written by the very same man who provides legal representation to the private agency who has Appellant's child in foster care; an apparent conflict of interest since he knew full well of the possibility Part 1, being challenged at the time by Appellant, might be declared unconstitutional, hence Part 6 was a backup statute.

64/ County Attorney, in his March 10, 1983 Memo in Support of Petition, Issue III, to his appeal asking for a new trial, admitted 2nd judge was without jurisdiction to order a new trial, yet he asked for and got it 1 - 1/2 years later.

court's granting of a new trial over denial by Montana's Supreme Court, violated due process clauses of 5th and 14th Amendments.

Thus, the Stipulation and incomplete adversarial proceedings leading to the Stipulation are unconstitutional.[65] [66]

7. APPELLATE COURT ALLOWED "CLEAR AND CONVINCING EVIDENCE" DOCTRINE DID NOT REQUIRE FULL AND FAIR TRIAL BUT RELIED UPON STATE EVIDENCE ABSENT DEFENSE.

Montana's Supreme Court erred, and its actions unconstitutional, in view of fact not all of the evidence nor all of the hearings were heard, when it declined to review correctness, substantiality and

---

65/ The 2nd judge disobeyed his Mt.Sup.Ct.'s Order denying County Attorney his new trial. The judge may not have known of the Order because none of the briefs, motions or oral auguments on the record contained reference to that (83-120) Order.

66/ The Stipulation came about as a result of two things: An illegal new trial, which trial did not contain a defense; and, a judge who refused to hear the defense instead telling the 3 sides to bring him a settlement he could sign or, "I'll write a decision no one can appeal." A phrase heard out in the courtroom spoken in chambers.

completeness of evidence and evidentiary hearings, in spite of both common law of Montana and common law of this Court to the contrary, lower court was not required to afford Appellant a full and fair trial to a completion.[67]

Montana's Supreme Court rendered its opinion (86-538) heavily relying on testimony of State witnesses whereas incomplete hearings afforded defense only one witness, out of many.[68]

Montana's Supreme Court did not comply with its own and US Supreme Court requirements, "clear and convincing evidence", missing from Montana statutes, requires a full and fair hearing in which an adequate defense shall be afforded.

8. INFRINGEMENT OF RIGHTS WAS NOT SUFFICIENTLY DRASTIC TO INVOKE CONSTITUTIONAL PROTECTIONS.

67/ Assuming a new trial were constitutional in view of Mt.Sup.Ct. denial (83-120) and Appellant's Rights violated in the 1st place.

68/ The one character witness for Appellant was called out of order by consent.

Montana's Supreme Court opinion erred, and was unconstitutional, in holding, in effect, Infringement of Parental Human Rights[69] by lower court was not sufficiently drastic to be in violation of due process clauses of the 5th and 14th Amendments; fair trial, speedy trial clauses of the 6th and 7th, when judge called for a settlement instead of affording Appellant[70] a full evidentiary bifurcated[71] hearing so as to reach its correct decision.[72]

69/ Rights reserved in the people by the 9th and 10 Amendments.

70/ Appellant was fully prepared to call over a hundred witnesses to testify including experts of his choice to rebut the State's and Guardian ad Litem's joint position to terminate.

71/ Motion for bifurcated hearings was granted in December 1984.

72/ From the beginning in 1980, misapplication of Title 40, MCA, termination, prejudicial actions without court ordered paternity, failure to follow common law procedures (statutes defining procedures do not follow common law), confusion as to meaning of Title 40, applicable or not applicable to Appellant at the time, the judge overruling strong objections the Title 40 actions and consolidation procedures were unconstitional, all this lead to the June 29, 1981 DJ-[illegible]-188 Decision denying unconstitutional application of Title 40 to Appellant. That denial was reversed upon appea

Vagueness of Titles 40 and 41, MCA, and the practice in applying them, are repugnant to the Constitution and have led to great confusion among the three sides of this case and have prolonged this case going on 9 years.[73] Appellant was thus only afforded partial due process in State's challenge to Rights reserved in

---

(81-523) making that constitutional issue of due process alive again and in view of fact the 2nd judge ordered a new trial in spite of his Supreme Court's denial of a new trial, it has never died since.

Complying with the remittitur, the 2nd judge could have made further findings which went to the issue of unconstitutionality of misapplication of Title 40 to Appellant and rendered judgment accordingly. He could have dismissed the case or issued a summary judgment in favor of Appellant, all instead of ordering an illegal new trial which resulted in the judge refusing to hear anymore of the case, opting for a settlement.

73/ The list of what is wrong with Titles 40 and 41, MCA, is long. Appellant counts at least 28 wrongs.

And the most important element is the impact termination has upon the family. Such cases often result in grave and grievous pain worse than in any divorce, especially to children. Often far worse than death in the blood line. Therefore, the constitutionality of lax civil (versus tight criminal) termination procedures of the statutes is challenged. The constitutionality of historical developments which bureaucratically flow from permissivity, laxiety, assumptiveness, and vagueness of the civil statutes is also contested.

the people.[74]

The Right to a full and fair trial,[75] which seeks to end Parental Rights, cannot be constitutionally terminated on desires of the judge part way thru a hearing simply because he feels the case is too complicated, too difficult or he cannot, tho he feels he must, balance Parental Rights against rights of the State nor against Rights of the child.[76] Nor because he

---

74/ 9th and 10th Amendment Rights.

75/ If statutes required and permitted but criminal Parental Rights allegations and terminations, society, the State, and judges would be more inclined to presume innocence until proven guilty and those trials would impose the omniscience of constitutional safeguards now missing in civil adversarial proceedings. Meaning to be derived from Santosky, supra.

There are those who would say the uniformity of applying far more stringent safeguard requirements to terminate Parental Rights, violates state's rights to decide for its population, whether by experience or experiment, what constitutes safeguards. The simple answer is that this thesis has not worked to afford equal protection of law. This case at bar is one case in point and there are thousands of others, with more to come as a psuedo-nazi-like movement grows to get those parents who are suspected of abuse, neglect or dependency and take charge of lives of the children who then become dedicated to the premise, "the state can do no wrong".

76/ Meaning derived from Fierro v. Ljubicich, supra.

wants to substitute his non statutory settlement for a complete, full and fair trial.[77]

Montana permits the courts by statutes only two ways to terminate Parental Rights.[78] A settlement is not one of them. Appellant did not marry the State only to wind up in a divorce joint custody case. He has never agreed to relinguishment[79] nor has his Parental Rights been conclusively terminated.[80]

For purposes of ascertaining if infringement of Rights was or was not sufficiently drastic to invoke constitutional protections, Appellant wishes to bring to

---

77/ The trial judge is without discretion, on or off the record, to call for a settlement leaving Appellant's child in foster care without affording him a full and fair hearing and without termination of his Parental Rights which in and of itself constitutionally requires a full and fair hearing.
78/ By relinguishment or by termination after trial on States allegations of abuse, neglect or dependency.
79/ Alto he was pressured many times into giving up.
80/ See Appendix C, pages 6 and 7, paragraphs 3, 4, & 5.

the attention of this Court the precise places in Title 41 where the "the best interests of the child" are referred to in terms to suggest they are paramount, under color of law, to Parental Rights and to constitutional safeguards and protections which require of the State first find the parent unfit to parent then go to the best interests of the child. Please refer to Appendix L for Title 40 & 41 quotes.

Title 41-3-101, Declaration of policy, begins the series of "best interests of the child" thru allegations of child abuse, neglect, and dependency whether directed at someone or simply said to exist, directed at no one.

In 41-3-101, deciding what constitutes welfare of the child, insuring the child be afforded an adequate environment and other parameters of life, largely is left to those whose feel they fulfill state policy. That is not necessarily the court, especially at the beginning of any given

case of alleged, anything.

In 41-3-102, Definitions, the problem is compounded with such words as, "normal", "harmed or threatened with harm", "excessive", "adequate", "risk of harm", "destitute", "dependent upon public support".

It is those whose feel they fulfill state policy, along with others in the community working for them, who pose a real danger of over-zeal to protect the child at the expense of parental rights.

These words apply stereotypal; every one is compared to some ideal model by system workers. Once inside the family, the prime motive of the State is to set aside parental rights and go directly to what they perceive to be "the best interests of the child". That begins the process, looking very much like lebensborn.

An allegation, petition, affirmative affidavit in support of a petition, or recommendations, goes around constitutional rights of parents directly to best in-

terests of the child as if the allegation were the truth. Truth of the allegation is what an evidentiary factfinding proceeding is designed to discover.

Notice 41-3-401(1) covers in general the filing of all petitions alleging abuse, neglect, and dependency and sets the conditions for branching in (10) (a-d).

41-3-401(10)(d) goes directly to best interests of the child.

It is justice for the State only to ask for court action, as relief prayed for, upon what the State can prove, in this case, by "clear and convincing evidence". That conforms to the lawful State challenge principle.

But notice in total of 41-3-401 a petition is not necessarily directed at a parent.

This case presents a situation where the putative father, Appellant, was not named as the one "committing" anything against the child, only that while the child was

ward of the State, it was in need of care. See TIA May 28, 1980.

Thus, while the State had that allegation of the child in need of care, it was not drastic enough to invoke constitutional protections of Appellant against unreasonable search and seisure (stipulations of invasion of his privacy).

41-3-401(7) gives to any person interested in Appellant's cause the right to appear, yet Appellant's witnesses, including his wife, were excluded from appearing in his behalf. Not drastic enough to invoke.

41-3-402 does not require the allegations of a petition be directed at anyone. Only that the allegations are facts.

41-3-403(2)(f); 41-3-404(4)(b); 41-3-406(5); 41-3-408(6)(d); 41-3-602; 41-3-607(3); 41-3-609(3); 41-3-610(2) speak to the best interests of the child.

41-3-607(4) prevents invoking the right to jury trial.

41-3-609(c)(i) an appropriate "treatment plan", under 41-3-603(4), was never introduced in this case because Parts 1 & 4 prevaled over Part 6. This "treatment plan" is required of USCS Title 42 Sections 601, et seq which deals with foster care matching funds.

USCS Title 42-601 et seq also requires the sitting of a parent on the foster care review committee. This has never been permitted in Montana and is intentionally omitted from MCA Title 41-3-1115. Inaction to implement intent of Congress on this matter was not drastic enough to have invoked federal sanctions against Montana. But this refusal to even permit Appellant on the committee compounded the parent-child relationship by a lack of communication to authority thru channels of those parental concerns created by foster care.

While some of the places in Title 41 where best interests are referred to are put in place after termination of parental

rights, the 5 points of common law, which must be followed before the best interests of the child are implemented, are not found in any Part of Title 41, Chapter 3, nor any combination of those Parts, nor in Title 40, Chapter Part 1.

Application of Title 41-3-101, et seq to Appellant apparently was not drastic enough to invoke his constitutional protections.

Title 40-6-130 contains best interests. A simple preponderance of the evidence is all that us required of the standard used by the courts in Title 40-6-101 et seq.

Illegal application of Title 40-6-101, et seq., by the Guardian Ad Litem in his bid for Appellant's Parental Rights termination, to Appellant apparantly was not drastic enough to invoke Appellant's constitutional protections.

If any one application of state statutes to Appellant was ruled error, in this case, this Court should view this as a

serious infringement and to warrant consideration as drastic enough to have invoked constitutional safeguards and protections for Appellant's Parental Rights. Application of Title 40-6-128 and 130 to Appellant was ruled error (unappealed) by Mt.Sup.Ct. in 81-523.

Likewise, and the reason Title 40 was used against Appellant, Guardian Ad Litem's siding with the State, in GAL's use of Title 40 termination cause, was ruled error by Mt.Sup.Ct. in 81-523, simply because he had no standing (unappealed). This too should be viewed as serious enough to warrant consideration as drastic enough to have invoked constititutional safeguards and protections of Appellant's Rights.

IN CONCLUSION

Those are briefly some of the problems encountered in application of Titles 40 and 41 to Appellant over the years. This

says little about the effects upon those whose lives were adversely affected.

This has been a lengthy case which should have been resolved in Appellant's favor in as short a time as it took to exercise police powers of the State in the first place.

We have seen gross misapplication of unjust statutes, depriving a child of its childhood with its own parent, Appellant, who has never had his Parental Rights conclusively terminated, only that it was better the child reside in foster care of State and private agency choice. Where the child prefers to live is not an issue for consideration by a competent court of jurisdiction until both of the child's parents' parental rights are terminated conclusively.

RELIEF PRAYED FOR

Relief prayed for is to return the case to lower court for further proceedings not

inconsistent with this Court's Opinion, and Order, directing, the child be returned to Appellant with minimal supervision and interference to assure a stable transfer of custody of his child from the State to her rightful family.

Would you allow, without termination of parental rights, a change in a child's home because the State and private agency personages feel the child would be better off where they said?

It is respectfully submitted, the "Whittling" away of constitutional rights by governmental agencies and private agencies, on the ground encroachment is not substantial enough to warrant the application of constitutional safeguards and protections, is void under the "Due Process clauses of the 5th and 14th Amendments and should be stopped by bringing this Court's review on Appeal from Montana Supreme Court or in the Alternative, Count One, that these papers be treated as a Petition

for a Writ Of Certiorari, or, Alternative, Count Two, that these papers be treated as a Petition for a Writ Of Habeas Corpus in above entitled cause.

Dated, Billings, Montana,

December 11, 1987,

Respectfully submitted,

Frank Boring Fitzgerald

Frank Boring Fitzgerald,

Appellant, Pro Se

APPENDICES TO FOLLOW IN SEPARATE VOLUME.

AFFIDAVIT

STATE OF MONTANA)

) ss.

County of Yellowstone)

FRANK BORING FITZGERALD, being first duly sworn, hereby deposes and says:

He has personally prepared and read his APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

He certifies, in his judgment it is well founded.

Frank Boring Fitzgerald

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK B. FITZGERALD on this 11st day of December, 1987.

Linda Branum

Linda Branum

(SEAL)

Notary Public in State of Montana

Residing in Billings, Montana

My Commission Expires: 5/18/88

CERTIFICATE OF SERVICE

This is to Certify, I, Frank Boring Fitzgerald, have served via prepaid first class mail, the above APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA on the following persons known to be of interest in this APPEAL:

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Mt.

Gene Huntington, Director, Dept Family Services, Helena, Mt.

Dave Lewis, Director, Dept Social & Rehabilitation Services, Helena, Mt.

Harold Hanser, County Attorny, Billings, Mt.

Greg S. Mullowney, Dep.Cnty.Att., Billings, Mt.

Damon L. Gannett, Guardian Ad Litem, Billings, Mt.

Ralph L. Herriott, Former Counsel for Appellant
Billings, Mt. 59101

Dated: December 16, 1987

Frank Boring Fitzgerald

Frank Boring Fitzgerald

87- 1588
No.

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM 1987

IN THE SUPREME COURT

OF THE UNITED STATES

FRANK BORING FITZGERALD,	)
APPELLANT,	)
vs.	)
STATE OF MONTANA, DEPARTMENT	)
OF FAMILY SERVICES,	)
GENE HUNTINGTON, DIRECTOR	)
RESPONDENT. 1/	)

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA 2/

APPENDICES PART 1 OF 2 PARTS

APPEARANCE: FRANK BORING FITZGERALD
3000 HALLOWELL LN
BILLINGS, MT 59101
406-259-5866
APPELLANT, PRO SE

1/ FORMERLY DEPT. SOCIAL & REHABILITATIVE SERVICES, DAVE LEWIS, DIRECTOR.

2/ CASE BELOW, 86-538, IN RE: MGM, YOUTH IN NEED OF CARE. 741 P2 770.

APPENDICES PART 1

A...86-538 3rd appeal.....apl-12

B...Reh. Den. 86-538.....apl3

C...Sept 2, 1986 Decision.....apl4-65

D...June 29, 1981 Decision.....ap66-77

E-A...81-523 1st appeal.....ap78-91

E-B...81-523 1st Stay Order.....ap92-93

E-C...81-523 2nd Stay Order.....ap94-95

F...83-120 2nd appeal.....ap96-97

G...Phillips Statement.....ap98-108

APPENDICES PART 2

H...Birth cert substituted.....apl09-110

I-A...Van Dyk Report.....apl11-126

I-B...Earlier Van Dyk Report.....apl27-131

J...Mt & US Cons quotes.....apl32-138

K...Case Flow Chart.....apl39-146

L...MCA-40,41, USCS-25 quotes....apl47-191

M...proof of fictitious name.....apl92-193

N NOTICE OF APPEAL ap 194-195

APPENDIX A (Typed Copy)

No. 86-538

IN THE SUPREME COURT OF THE STATE OF MONTANA

1987

IN THE MATTER OF M.G.M.
Youth in Need of Care.

APPEAL FROM: District Court of the 13th Judicial District, In and for the County of Yellowstone, The Honorable William Speare, presiding.

COUNSEL OF RECORD:

For Appellant: Ralph L. Herriott, Billings, Montana
For Respondent: Hon. Mike Greely, Attorney General, Helena, Montana
Harold Hanser, County Attorney, Billings, Montana
Greg Muyllowney, Deputy County Atty., Billings, Montana
Damon Gannett, Guardian Ad Litem, Billings, Montana

Submitted on Briefs: July 1, 1987

Decided: August 20, 1987

Filed: Aug 20 1987

(Signature) Ethel M. Harrison, Clerk

(Reported at 741 P2 770)

Mr. Justice R. C. McDonough delivered the

Opinion of the Court.

The natural father of M.G.M. appeals the September 2, 1986, order of the 13th Judicial District Court, County of Yellowstone, finding M.G.M. to be a youth in need of care and awarding temporary custody to the Montana Department of Social and Rehabilitation Services. We affirm.

This matter was previously before this Court in In the Matter of M.G.M. (1982), 201 Mont. 400, 654 P2 994. The pertinent facts of the case prior to 1982 are contained in that opinion. On appeal, we reversed the lower court's termination of the natural father's parental rights for failure to find that M.G.M. was a youth in need of care remanded for further findings.

During the pendency of the previous appeal, M.G.M. was placed in a foster home in Missoula. Following remand, the termination of parental rights proceedings were

halted midway through trial by agreement of the parties. In a court approved stipulation, the parties agreed that M.G.M. would be placed in the care and custody of the natural father for a period of six weeks. During that period, M.G.M. would meet once a week with psychologist Richard Agosto to monitor M.G.M.'s mental and emotional well-being. In the event Dr. Agosto found M.G.M. was suffering, or likely to suffer, identifiable and substantial impairment of her intellectual or psychological functioning due to the acts or omissions of the natural father, M.G.M. would return to her foster home on a permanent basis. The natural father would maintain visitation rights under the agreement.

Dr. Agosto issued a written report on August 2, 1985, concerning M.G.M.'s mental and emotional well-being during her stay with the natural father. Dr. Agosto found that M.G.M.'s intellectual development was close to that of a fifteen year old while

her emotional and social development was comparable to the nine or ten year old level. During M.G.M.s six week stay with the natural father, Dr. Agosto noted symptoms of emotional stress by M.G.M. including sleep disruption, weight loss, fatigue, feelings of helplessness and increased levels of anger. M.G.M. considered the natural father and his new wife to be critical of her which diminished M.G.M.'s self-esteem.

In his report, Dr. Agosto concluded that M.G.M. suffered identifiable impairment of her psychological functioning during her stay with the natural father. Dr. Agosto described M.G.M. as a very vulnerable young teenager in need of a supportive and loving family. Dr. Agosto recommended that M.G.M. return to her foster family.

The natural father filed a contempt petition on September 12, 1985, alleging the State and guardian ad litem had violated the terms of the stipulation and that he

was entitled to custody of M.G.M. Specifically, the natural father alleged that Dr. Agosto did not conclude M.G.M. had suffered substantial impairment of her intellectual or psychological functioning necessary to terminate his custody rights as provided in the agreement. A hearing on the contempt motion was held October 31, 1985.

Dr. Agosto testified at the hearing that he concluded M.G.M. had suffered substantial impairment of her psychological functioning during her stay with the natural father and would be at risk of greater emotional stress should the placement continue. Following hearing, the court denied the contempt motion of the natural father.

On January 8, 1986, the State filed a motion to set a hearing date to determine whether M.G.M. was a youth in need of care and whether the stipulation entitled the State to maintain M.G.M.'s placement with her foster family in Missoula. A hearing

was held February 6, 1986, and testimony received from Vince Matule, director of the Casey Family Foundation which was responsible for monitoring M.G.M.'s placement. Matule recommended that M.G.M. continue in her present foster home placement with the natural father retaining visitation rights. Matule believed that M.G.M. was in need of stability and a secure family during her adolescence and that her foster family in Missoula met these needs.

The District Court entered its findings of fact, conclusions of law, and order on September 2, 1986. The court found M.G.M. to be a youth in need of care, that it was in M.G.M.'s best interest to continue her placement with her foster family, and that the natural father shall be entitled to regular visitation. The natural father appeals and raises the following issue: Are the District Court's findings of fact and conclusions of law supported by clear and convincing evidence?

The natural father first contends that the District Court erred in adopting previous findings of the District Court because such findings were rejected on appeal by this Court. We disagree. Our previous opinion in this matter clearly stated that the case was remanded "for further findings." 201 Mont. at 401, 654 P2 at 998. We reversed on appeal because the lower court failed to find that the natural father abused or neglected M.G.M. In order to deprive a parent of child custody pursuant to 41-3-404 and -406, MCA, the court must find that the child is abused, neglected or dependent.

With the exception of the District Court finding relating to opinion testimony of the psychiatric nurse, this Court did not reject any of the District Court's findings in our previous opinion. We find no error in the District court adopting these findings on remand. Findings one through nine, objected to by the natural father,

are supported by substantial credible evidence.

The natural father contends there is insufficient evidence to support Dr. Agosto's conclusion that M.G.M. suffered substantial impairment of her psychological functioning during her stay with the natural father and would be at risk of increased emotional stress if the placement continued. The record shows Dr. Agosto is well qualified as a clinical psychologist. Dr. Agosto had weekly sessions with M.G.M. during her stay with the natural father. Dr. Agosto noted that M.G.M. suffered the classic symptoms of depression and emotional stress during the period. Dr. Agosto's testimony and affidavit reflect his belief that M.G.M. suffered substantial psychological impairment while in the custody of the natural father. We find no reason to doubt Dr. Agosto's conclusions regarding M.G.M.

The natural father further contends that

there is not clear and convincing evidence to support the District Court's finding that M.G.M. was a youth in need of care and that the court again improperly applied the "best interest" test. In finding M.G.M. was a youth in need of care, the District Court applied 41-3-102, MCA, which provides in part:

> (2) An "abused or neglected child" means a child whose normal physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.

M.G.M. spent the first five years of her life with her mother, who suffered from chronic schizophrenia. M.G.M. did not develop normally and adapted to a role-reversal with her mother. The testimony of mental health professionals in this case indicates that children of schizophrenics increase their risk of developing schizophrenia if raised by schizophrenic parents because they fail to properly develop their own self-identity. The natural

father is also a diagnosed schizophrenic.

Testimony was given at the May 2 and 3, 1985, hearing by three mental health professionals involved with the case. Each witness favored placing M.G.M. with a foster family to prevent the possibility of M.G.M. developing schizophrenia as a result of being raised by a schizophrenic parent.

Dr. Wagner, a clinical psychologist, testified that it would be stressful for M.G.M. to be in the custody of the natural father, and recommended that M.G.M. continue to reside with her foster family. Testimony was also received from Dr. Tranel, a psychologist who interviewed and tested both M.G.M. and the natural father in 1980. Dr. Tranel stated his opinion that the acts, conduct, or omissions of the natural father posed imminent risk of harm to M.G.M.'s psychological well-being.

Mary Honaker, a certified mental health professional who conducted therapy with

M.G.M., testified that M.G.M. was distressed and apathetic during periods when she visited the natural father. Honaker testified that she felt further visits with the natural father would be harmful to M.G.M.

Dr. Tranel, Dr. Wagner and Ms. Honaker, were not actively involved with M.G.M. or the natural father after 1981. However, both Dr. Tranel and Dr. Wagner testified that the natural father's schizophrenic condition would not improve without therapy and treatment. There is no evidence that the natural father has sought treatment for his condition.

We find clear and convincing evidence in the record to support the District Court's determination that M.G.M. is a youth in need of care within the meaning of 41-3-102, MCA. The record clearly supports transferring custody to the State with M.G.M. continuing in her present foster home.

The District court is affirmed.

(Signature) R.C.McDonough, Justice

We concur:

(Signatures) Harrison, Weber, Hunt, Gulbrandon

APPENDIX B (Typed Copy)

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 86-538

IN THE MATTER OF M.G.M.)
a Youth in Need of Care.) O R D E R

Frank B. Fitzgerald has filed his petition for rehearing of the above entitled matter and having filed his motion for leave of court to file a brief in support of such petition,

IT IS HEREBY ORDERED that such motion is granted and having considered such petition and brief,

IT IS FURTHER ORDERED that the Petition for Rehearing is denied.

DATED this 17th day of September, 1987.

(Signatures) Turnage, Chief Justice
Harrison, Weber, Sheehy, Gulbrandon, Justices

Filed SEP 17 1987
(Signature) Ethel M. Harrison
CLERK OF SUPREME COURT
STATE OF MONTANA (Received Sept 19-87)

APPENDIX C (Typed Copy)

IN THE DISTRICT COURT OF THE 13TH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF	)No. DJ-79-188, THE
	)COURT'S FINDINGS OF
MARGARET G. MOORE,	)FACT, CONCLUSIONS
	)OF LAW AND ORDER
Youth in Need of Care.)	

This matter came before this Court on May 2 and 3, 1985, October 31, 1985, and February 6, 1986. Greg Mullowney, Deputy Yellowstone County Attorney, appeared for and on behalf of the Yellowstone County Resource Department of the Montana Department of Social and Rehabilitation Services. Court-appointed guardian ad litem, Damon L. Gannett, appeared on behalf of the above-named youth, Margaret Geraldine Moore. Respondent Frank Fitzgerald appeared with his attorney Jeffrey T. Renz.

This matter was originally brought before this Court pursuant to the State's Petition to Terminate the Respondent's Parental Rights to the above-named youth.

Trial proceedings took place on May 2 and 3, 1985 and remaining testimony was scheduled for May 30, 1985. The parties informed the Court prior to May 30, 1985 that it had reached an agreement settling the case, and that the agreement was being reduced to writing. A written Stipulation was signed by all parties by July 26, 1985 and approved and ordered by this Court on August 13, 1985.

In September 1985 the Respondent filed a Petition to hold the State and guardian ad litem in contempt for violating the terms of the Stipulation and Order. After hearing testimony on October 31, 1985, this Court found that there had been insufficient evidence to hold either party in contempt.

On February 6, 1986, the parties stipulated into evidence the transcript of the October 31, 1985 hearing, and the Court heard other testimony.

The Court, having considered the prev-

ious record in this matter, as well as the evidence produced at all hearings before this particular Court, now makes the following:

FINDINGS OF FACT

1. The above-named child, Margaret Geraldine Moore, was born out of wedlock on June 10, 1972 in Yellowstone County, Montana, to Jewel Moore.

2. Margaret spent the first five years of her life with her natural mother, Jewel, who suffered from chronic schizophrenia, undifferentiated type with paranoid ideation. Jewel was actively psychotic much of the time, heard voices, and had a difficult time caring for Margaret, who was generally unclean and unkempt. Margaret may have been sexually abused while in Jewel's care. Margaret was removed from Jewel's care and placed in a foster care home in 1979. Because of Jewel's demonstrated inability to relate to reality and the inability to relate to the commun-

ity's concerns about Margaret, her parental rights to Margaret were terminated on April 3, 1980. A copy of the Court's Memorandum, Conclusions, and Order in that proceeding is attached hereto and incorporated herein as EXHIBIT A, in order to provide information about Margaret's background.

During the first five years of her life, Margaret failed to develop normally as a child, and exhibited some of the characteristics of schizophrenia. She failed to develop a self-identity, having adapted to a role reversal with her mother. The State and various professionals were of the opinion that there is statistically-established relationship between schizophrenia in parents and the development of schizophrenia in children, based upon genetic and environmental factors. Because of Margaret's genetic background (Jewel's schizophrenia) and the environment in which she lived for the first five years

of her life, she was considered to be "at risk" to develop the mental illness of schizophrenia.

3. Margaret's natural father was then determined to be the Respondent, Frank B. Fitzgerald. Frank had never been married to Jewel, but lived next door to Margaret and Jewel for a period of time after Margaret's birth. Frank's contact with Margaret was extremely limited by Jewel, who did not tell Margaret that Frank was her father and she often expressed to Margaret her revulsion of him.

4. Frank receives a disability pension for a 1963 Veteran's Administration diagnosis of an undifferentiated schizophrenic reaction. Frank was diagonsed schizophrenic in 1980 by Ned Tranel, a duly-qualified clinical psychologist. Frank was also diagnosed as a schizotypal personality disorder by duly-qualified clinical psychologist. Without extensive counseling, psychologists expect their diagonses of Frank

to remain unchanged. No evidence has been provided to show that this intervention has occurred or that Frank's mental condition has changed.

5. After the determination that Frank was Margaret's father, efforts were made to arrange meetings between them. Margaret was in foster care prior to these meetings, and had been regularly receiving therapy from Mary Honaker, a licensed registered nurse and who has been certified since 1979 by the Montana Department of Institutions as a professional person under section 53-21-106, MCA. Two visits occurred after a year and a half of preparation, and resulted in a "smothering" of Margaret by Frank, with Margaret becoming frightened and upset and experiencing a weight loss. There was also concern at this time that Frank was unable to understand Margaret's needs and respond appropriately.

6. The State terminated efforts at

visitations between Frank and Margaret, and moved to terminate his parental rights for the reason that placing Margaret in Frank's custody would significantly increase the risk that she would become mentally ill. The District Court terminated Frank's parental rights and she was subsequently placed in a foster home in Missoula, Montana, through the Casey Family Foundation, a private agency that provides specialized treatment-oriented foster homes for disturbed children. This particular foster home was chosen for Margaret because it is a close, loving, emotional family that provides the nurturance and acceptance that Margaret needs.

7. Frank successfully appealed the termination of his parental rights, and the judgment was reversed and remanded for further findings. See In the Matter of M.G.M., Youth in Need of Care (1982), 39 St. Rptr. 2191, 201 Mont. 400, 654 P2 994.

8. Pending retrial in this matter,

Margaret continued to reside in foster care in Missoula, Montana, and occasionally had visits with Frank, and his new wife, Velma, who had been named as Margaret's godmother by Jewel. Vince Matule, Montana director of the Casey Family Program, testified that Margaret had a lack of emotional responses natural to children. He was concerned about Franks continued lack of understanding about Margaret's needs and Frank's poor judgment in sharing details of sexual abuse and psychological evaluations with her.

9. Margaret is described as being fragile, chameleon-like youth with a critical need at this particular phase of adolescence for nurturance, acceptance, and stable role-models.

10. Partway through the re-trial of this matter, the parties entered into a court approved Stipulation, attached hereto and incorporated as EXHIBIT B. That Stipulationwas designed to provide Frank

with the opportunity to provide for Margaret's parental care in his home for six weeks from June 24 until August 5, 1985. During that period of time, it was agreed that Margaret would meet with psychologist Richard Agosto once per week in order to monitor Margaret's mental well-being. In the event Dr. Agosto found that Margaret had suffered or is at imminent risk of suffering an identifiable and substantial impairment of her intellectual or psychological functioning as a result of the acts or omissions of Frank Fitzgerald, it was agreed that she shall be placed with her foster family on a permanent basis and appropriate arrangements made for visitation between Frank and Margaret.

11. Margaret resided in the Billings, Montana, home of Frank Fitzgerald for the six week period from June 24, 1985 to August 5, 1985. Dr. Agosto's August 2, 1985 written report of his evaluations of Margaret is attached hereto and incorporated

herein as EXHIBIT C. His testimony at the October 31, 1985 hearing is on file herein, identified as EXHIBIT D. Dr. Agosto found at his initial screening that Margaret's mental development showed increased reading ability and above average growth in vocabulary and general information skills for a 13 year old entering the 8th grade, but that her emotional and social development was typical of a 9 or 10 year old child. Dr. Agosto describes Margaret as a ". . .very vulnerable young teenager who has not yet achieved a good level of stability and security." Her self-esteem was described as weak and could be easily disturbed to the point of regression. Dr. Agosto noted that during the period that Margaret resided in Frank's home she showed signs of increased stress and emotional presssure in the forms of sleep disruption, wight loss, feelings of helplessness, sadness, depression, and anger. Dr. Agosto wrote in his report:

"In conclusion, therefore, it is my impression that Margaret Moore has suffered some identifiable impairment of her psychological functioning over the past few weeks. In addition, she is potentially at risk of greater levels of emotional stress and disruption should she be placed on a more permanent basis with the Fitzgeralds. In part, she has begun to show some diminished self-esteem and depressive anxious reactions due to some of the types of interaction that she has had with Frank and Velma. Margaret perceives them, and primarily Velma, as being very critical of her, not accepting Margarets feelings and as to being helpful to her in developing any constructive ways of dealing with difficulties. She also feels that rather than being able to draw from her exposure to Frank and Velma models of effective adult and mature behavior that she has to be more of a leader and more decisive than they are. It appears that the Fitzgeralds have not been very effective in helping Margaret maintain a good level of self-esteem. In fact, their behavior has diminished some of her feelings of self-esteem and security by failing to realize some of her individual needs, reducing her self-respect, and not accepting her personal feelings as being real and failing to support their expression and existence.

12. After Dr. Agosto issued his findings, Margaret was returned to her foster family in Missoula, Montana, continues to attend school there, and is doing well in that placement and not requiring any coun-

seling. Vince Matule, however, expects that she will require additional counseling in the future to deal with the stresses of adolescence.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all matters, persons, and things involved herein and proper service of process in all matters in this action has been had on all persons involved and concerned herein.

2. Margaret Geraldine Moore is a youth in need of care within the meaning of section 41-3-102, MCA, for the reason that her normal mental health or welfare has been harmed by the acts and omissions of Respondent Frank B. Fitzgerald while she resided in his custody during the summer of 1985, and is threatened with further harm if placed in his custody on a permanent basis. This mental injury is an identifiable and substantial impairment of her intellectual and psychological functioning.

3. Rather than proceeding to trial on the Petition to Terminate the Respondent's Parental Rights, the parties entered into a written Stipulation (EXHIBIT B) to provide for Margarets custody. That Stipulation governs and binds all parties thereto as the resolution of this case.

4. It is in Margaret Geraldine Moore's best interests that she be placed in the temporary care, custody, and control of the Montana Department of Social and Rehabilitation Services with the right to continue her placement with her current Casey Family Program foster family in Missoula, Montana, until she reaches the age of 18 years old, with the right to seek any necessary medical, dental, and psychological treatment for her and have access to that information and share it with the Casey Family Program.

5. Frank Fitzgerald shall be entitled to regular visitation with Margaret Moore, and plans for these visitations shall be

arranged through the guardian ad litem, the Casey Family Program, and counsel for Frank Fitzgerald. That plan shall be reduced to writing and submitted to this Court for approval by September 30, 1986.

Dated this 2nd day of Sept, 1986.

(Signature) William J. Speare, District Judge

CERTIFICATE OF SERVICE Sept 4, 1986

EXHIBIT A of APPENDIX C (Typed Copy)

IN THE DISTRICT COURT OF THE 13TH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF	)	Cause No.
	)	DJ-79-188
MARGARET G. MOORE	)	MEMORANDUM,
	)	CONCLUSIONS
Dependent and Neglected.	)	AND ORDER

M E M O R A N D U M

Jewel Esther Moore is 43 years old, and a college graduate with a B.A. in journalism and an English major. She has accomplished graduate work in Latin American studies and in journalism editing. She has worked for newspapers, a radio station, the Baptist Board of Missions in New York, the New York City Department of Welfare, and taught English in High School for a brief period. She now lives in a house in Billings, at 318 Terry Avenue, which house was received from her mother. She has not worked since 1967, the year in which her father died leaving her a modest inheritance on which she has been living since that time.

She has not been married but on June 10, 1972, gave birth to a daughter, Margaret G. Moore, who has lived under her care up to the time of the initiation of these proceedings. The child's father has not been determined and the mother declines to name a father. A Mr. Frank Fitzgerald, a neighbor to the mother, claims to be the father, but the mother denies this claim and no proceeding has yet been taken to adjudicate the question.

Starting in May, 1972, the mother came to the attention of Public Health personnel through a Public Health nurse, Mary Honaker, in connection with her pregnancy and because of evidence of mental health problems in the form of loose thinking and a constant upset condition. She was monitored through August 1973, but was not regarded as being pschotic at that time. At the occasion of the last visit of this series, which was August 15, 1973, the concern was that the mother was having

difficulty in taking care of the child and the house was being maintained in a poor condition. Specifically, there were many pets in the house, along with an overwhelming urine smell, and unemptied garbage. Generally, there was evidence of poor housekeeping by the mother. However, she was not continued as an active caseload client at that time.

Although not then know to any public health agency, by 1978 the mother had begun hearing voices no one else could hear and had become obsessed with the feeling that she was always being followed. These conditions led her, in 1978, to take her daughter and leave Billings for a destination purposely kept secret so the voices could not find her. After some traveling, she settled in Lubbock, Texas, where she bought a house and started her daughter in school but in a short time was again plagued by the voices. At times she became utterly terrified and the daughter (then

approximately 6 years old) had to assume the position of taking care of her mother, which included encouraging her mother to rent a motel on some nights in order to avoid the voices. In this process a series of telephone calls from the mother to Velma Morris, a friend and neighbor in Billings since 1970, exposed the condition of the mother and, ultimately, resulted in Velma Morris going to Texas in response to the mother's fear that "they" were threatening to torture and kill her and her daughter. The visit of Velma Morris settle things down, but the mother would not accept her recommendation to visit a doctor there, nor would she return to Billings with Velma Morris when she came home. However, the mother and daughter did come back to Billings soon thereafter and the daughter began attending Broadwater School.

On April 4th, 1979, at the suggestion of the school nurse, the mother took the

daughter to see Dr. Pat Sauer for complaints concerning an eye infection and a bowel-movement difficulty. In the course of the examination, Dr. Sauer noted the perineal area of the child was bruised and this consisted of numerous small bruises and a large one covering much of the area. In response to inquiry as to the cause, the child virtually became hysterical and the examination could go no further than an outward view. No satisfactory explanation was offered by the mother and, in fact, when she was questioned, her responses were very inappropriate and the doctor concluded that she had lost contact with reality and could not comprehend the questions he was asking and the purpose behind them. This conclusion was fortified by the mother's reference at that time to the voices she had been hearing. In the doctor's experience, these circumstances indicated the possibility of child abuse and he made arrangements for the daughter

to be again examined by a female doctor (an appointment which was never kept) and at the same time reported the matter to the Yellowstone County Welfare Department and requested an investigation by the child-abuse team. Specifically, the doctor was concerned about sexual abuse because of the location and nature of the bruises he had found.

On the following day, April 5th, a social worker who served as the intake worker for child abuse started the investigation by checking with the daughter's school and then by making a home visit. The school reported only that the daughter was generally unclean and unkempt. At the home the social worker was not allowed in the house but the mother did talk with her. She contended the bruises were actually just a rask and that it was caused by a bubble bath. She agreed to have her daughter examined again by another doctor. A second visit a few days later gained

entry into the house, but caused the mother to become very upset in consequence thereof. She repeated the bubble bath explanation and acknowledged that she had not taken the child to any other doctor for further examination. With this, the matter was then referred to the school nurse at the Broadwater School, who was the person who had originally prompted the April 4th visit to Dr. Sauer. On April 9th, 5 days after Dr. Sauer's examination, she examined the child and found no bruises existing at that time. This was not regarded as unusual considering the amount of time which had transpired. When the school nurse asked the daughter about what had been happening, the daughter said that she could not talk unless her mother was there but she did explain that "hurting" happened, except that sometimes they would let her sit in a hot bath when there was "hurting". She thought at times that something went into her and, in mentioning

this, she would grimace.

The daughter talked about her mother hearing voices all the time and she was concerned for her and wanted to get her help. The daughter seemed to be very worried about medical things, such as fear of death, and said she didn't cry at "hurting" because she was afraid they would sew something up in her and then she would die. The school nurse felt the child was talking more truth than fantasy and so she paid a visit to the mother. The mother repeated again the bubble bath explanation as the cause, but also mentioned that her daughter walked home from school with a little boy as another possible explanation. Nothing more definite than that was given.

Based upon her total contact, both before and after the April 4th visit to the doctor, the school nurse concluded that the daughter, who was a very bright and self-sufficient little girl, was actually

making decisions for the mother, such as picking out her clothes for her and deciding what to buy. Later, it was also learned that the daughter, as a pre-schooler, had made her own doctor appointments.

On April 10th the daughter did not attend school and the mother called to say that she was going to put her into a different school. This prompted the Welfare Department to seek and secure Court authority to take the child from the mother and place her in a foster home to avoid flight, which was felt to be the real reason behind the removal of the daughter from school.

At the foster home the child was at first very timid and was also reported to be unusually afraid of being alone with the foster father. In the time which has transpired, the daughter has adjusted very well, both as to the new home and to the new school. She is classified as a child of exceptional ability and exhibits anxi-

ety over the accomplishment of this proceeding.

On the day following removal of the daughter, the mother called the Mental Health Center and Mary Honaker, by now an experienced psychiatric nurse, saw her on April 12th. The mother discussed the voices she had been hearing, how they were continuing and were sometimes so loud she could not hear her daughter, and that the voices did not like her daughter. Immediate arrangements were made for the mother to see a psychiatrist, who prescribed medication for her, which the mother proceeded to lose, and had to have replaced. The mother has not continued to use of the medication as recommended and feels that anacin is all she needs.

On April 30th an effort was made to go over the child-abuse staffing report with the mother preparatory to establishing a program to get the mother and her daughter back together again. This meeting caused

the mother to become very upset and very paranoid with the result that she would not and could not continue with Mary Honaker on an individual basis and a group program was immediately arranged for her. Again, the objective was to get the mother stabilized so that her daughter could be returned to her.

Commencing April 30th the mother was enrolled in the Day-Treatment program at the Mental Health Center and she participated on a four-mornings-per-week schedule for six weeks. However, she unable to accept the realization that she had any problem even though she knew and discussed the fact that she was hearing voices. She could not focus on reality and accepted the program as a social experience only. She would not confront the subject of taking care of her daughter and would turn the conversation to other matters when it was raised. Finally, she dropped out of the program against the advice of the men-

tal health personnel who had acquired friendly feelings toward her and were anxious for success on her behalf. Later, the mother did participate in some outpatient sessions, which were held on a weekly basis, but with the same inability to focus on the need to help herself. No progress was actually ever accomplished.

On September 5th several of the welfare and mental health persons visited the mother in her home in an effort to convice her to accept further help in order to make return of her daughter possible. Hospitalization was suggested as a last-resort possibility that had not yet been tried. This was refused. In general, the mother still could not focus upon reality and understand or accept the intentions and purposes of her visitors. Her response to the question of whether she could protect her daughter from abuse was that she could not "because of the ADC mothers". She could only focus upon leaving the area

and when she would do so.

On October 9th the Director of the Day-Treatment Center, as a last resort, attempted a one-to-one conference with the mother, the object of which was to face her with the possibility that permanent custody of her daughter could be taken by the Welfare Department so that the real feelings and reactions of the mother could be determined. The mother's interest in treatment was not revived by this. Instead, she responded with completely dissociated answers. The Director attempted again on October 14th, but when she arrived at the mother's home her daughter was there on a visitation period from the foster home, so that it was inappropriate to have a discussion with the mother at that time. She asked the mother to call her so that she could come back at another time, but the mother has never responded.

In summary, the mother has been diagnosed as a chronic schizophrenic, undiffer-

entiated type with paranoid ideation, who is actively psychotic. Her condition is treatable to an extent, but is not curable; and from the failure of all efforts to help the mother, the conclusion has been reached by the mental health personnel that she is beyond help so far as being able to attain a condition where she can take care of her daughter and provide the reality background needed by a child. The role reversal already developing between mother and child could continue with the child taking care of the mother and being unable to find her own separate identity, thus rendering her vulnerable to a psychotic illness in her own right in the course of time.

The efforts made to maintain a mother-daughter relationship through regular visitation from the foster home have demonstrated the dangers ahead for the daughter. The daughter has been in a play-therapy program since April 19th, and through

the medium of this program, as well as reports from the foster parents, the effects of home visits upon the child have been tracked. The loss of reality experienced on home visits causes increased anxiety in the daughter. She no longer feels safe with her mother and is harassed by not being able to identify herself separate from her mother because of the role reversal which takes place. As a consequence, the frequency of home visitations has steadily declined in the interest of the daughter's welfare and apparently to her relief.

The testimony of the mother at the hearing confirmed the mother's inability to relate to reality and to grasp the purpose of the concern for her daughter. The continued placement of her daughter in a foster home was acceptable to her and she evidenced no distress over a potential Court decision that her daughter would not be living with her in the future.

Since December of 1979 the mother has accepted a 56-year-old male friend, who has an extensive history alcoholism, as a companion in her home. The man, James Smith, testified as to the "topsy-turvy" condition of the home at the time of his arrival and the efforts he has since made to clean the house up and to stock it with food and teach the mother how to cook and take care of the home. He suggests that marriage with the mother is a possibility in the future and feels that the mother's only problem is one of depression from time to time. With respect to the possibility of the daughter being returned to the home, Mr. Smith evidenced considerable equivocation about whether the mother could take care of the daughter in the home if he were not there to help her.

From the mother's standpoint, she feels that she has assumed the position of guardian with respect to James Smith, a situation necessitated by the Government

pension funds coming to Mr. Smith, with respect to which guardianship safeguards are imposed in view of his alcoholic history. She expressed the feeling that the program she was participating in was to take care of Jim Smith for from three to five years.

C O N C L U S I O N S

In light of the foregoing, it is concluded as follows:

1. The mother's mental condition is not curable and renders her unable to properly discharge normal parental responsibilities and to provide a safe and sane environment for her daughter.

2. There are no know alternatives remaining that have a reasonable chance of improving the mother's mental condition to a point that would allow her to re-assume care and responsibility for her daughter.

3. The probability is high that the daughter would develop mental problems similar to those suffered by her mother if

she were to be left with her mother.

4. The daughter, Margaret G. Moore, is an abused and neglected child within the meaning of Section 41-3-102 MCA 1979, and is a youth in need of care.

5. The best interests of the daughter require termination of the mother's parental rights.

6. No final disposition can be entered in this case until the rights of the currently unidentified father of the daughter, Margaret G. Moore, have been considered and determined.

From the foregoing, the Court now makes the following:

O R D E R

IT IS HEREBY ORDERED that the above-entitled Court has jurisdiction over all matters and persons involved herein, except as otherwise noted, and proper service of the necessary citations has been made on all persons whose rights and status will be affected hereby.

IT IS HEREBY ORDERED that the above-named Margaret G. Moore is a youth in need of care as an abused or neglected child within the meaning of Section 41-3-102 MCA 1979.

IT IS HEREBY ORDERED that the parenal rights of Jewel E. Moore, the mother of Margaret G. Moore and respondent herein, are terminated and temporary custody of Margaret G. Moore is continued in petitioner.

IT IS HEREBY ORDERED that the petitioner in this cause take all steps necessary to place at issue for hearing the claim of Frank B. Fitzgerald to be the natural father of Margaret G. Moore in order that the same can be determined preliminary to or as a part of the dispositional hearing to be held in this matter, which is set for the 18th day of June, 1980, commencing at the hour of 9:30 o'clock A.M.

IT IS HEREBY ORDERED that the foregoing Memorandum, which outlines the facts ad-

duced at the hearing in this cause, and the Conclusions of the court reached therefrom shall serve in lieu of formal Findings of Fact and Conclusions of Law.

DATED: April 3rd, 1980

(Signature) Charles Luedke, District Judge

cc: County Attorney
Jones Law Firm
Damon Gannett
Cal Stacey

EXHIBIT B of APPENDIX C (Typed Copy)

IN THE DISTRICT COURT OF THE 13TH
JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF) No. DJ-79-188
MARGARET GERALDINE MOORE) STIPULATION
Youth in Need of Care.) AND ORDER

COMES NOW Petitioner, the State of Montana, Respondent Frank B. Fitzgerald, and the Guardian Ad Litem, Damon L. Gannett, and stipulate as follows:

1. Margaret Moore shall physically reside with Respondent at his residence in Billings, Montana, commencing on or about June 24, 1985, and continuing until August 5, 1985.

2. During this period, Respondent agrees that Margaret Moore shall consult with a psychiatrist or a licensed psychologist. During the initial three (3) week period of Margaret Moore's residence with Respondent, Margaret shall attend a minimum of one (1) appointment per week with the selected psychiatrist or psychologist. If, in the opinion of the psychiatrist or

psychologist that is selected to consult with Margaret Moore, more frequent appointments are warranted, the schedule of appointments as is prescribed by the psychiatrist or psychologist shall be followed by all parties hereto.

3. Margaret shall also be permitted to visit with Guardian Ad Litem during this period as frequently as is deemed necessary. A minimum of one (1) such visit per week shall occur.

4. Respondent further agrees to permit a Department of Social Rehabilitation Services social worker to visit his home once per week. Said visits shall be by appointment only. The Department shall provide all counsel with copies of all notes, reports, memos, and other documents prepared or generated as a result of such visits, on a weekly basis. Respondent shall be permitted to have any person of his choice monitor such visits.

The purpose of these visits shall be to

monitor Margaret Moore and Respondent in terms of their mental and emotional well-being.

5. Margaret Moore shall be permitted to telephone her present foster family as she wishes, except, however, Respondent may limit the frequency and duration of those calls when this cost exceeds fifty ($50) per month.

Margaret Moore may visit with her foster family on alternative weekends unless a different frequency is recommended by the psychiatrist/pyschologist.

6. The selected psychiatrist/psychologist shall issue his/her report during the week of August 5, 1985. That report shall be made for the purpose of determining whether Margaret Moore has suffered or will suffer identifiable (hand-written insert, no initials, the two words, 'and substantial') impairment of her intellectual or psychological functioning or whether she is at imminent risk of an identifi-

able and substantial impaiment of her intellectual or psychological functioning as a result of the acts or omissions of the Respondent.

In the event Margaret Moore has suffered, or is threatened with the impairment described above, Margaret Moore shall be immediately placed with he foster family on a permanent basis. The parties shall thereafter come to an agreement providing for visits between Respondent and Margaret Moore.

7. In the event the psychiatrist/psychologist does not conclude that Margaret Moore has suffered or is threatened with the impairment described above, she shall remain with Respondent for the 1985-86 school year. At this time, the parties shall reevaluate the need and/or frequency of the visits and consultations set out in paragraphs 2, 3, 4, and 5 above.

8. At the end of the 1985-86 school year, the psychiatrist/psychologist shall

issue a second report as described in paragraph 6 above. In the event this report reaches the conclusions set out in paragraph 6, Margaret Moore shall be placed permanently with a foster family. The parties shall come to an agreement as to visitation.

9. In the event the psychiatrist/psychologist concludes that Margaret Moore has not suffered and will not suffer an identifiable and substantial impairment of her intellectual and psychological functioning as a result of the acts or omissions of Repondent, all Petitions in this case shall be dismissed with prejudice.

10. In the event the psychiatrist/psychologist cannot conclude on or about June 15, 1986, that Margaret Moore has suffered or is at imminent risk of suffering an identifiable and substantial impairment of her intellectual and psychological functioning as a result of the acts or omissions of Respondent, Margaret Moore shall

remain with Respondent and this case shall be reviewed by the psychiatrist/psychologist annually.

11. The parties agree that Dr. Richard Agosto and Dr. Marian Martin may conduct the evaluations called for in this stipulation. Said psychologist shall conduct an initial evaluation in June 1985, to provide "base line" data. Copies of all reports shall be provided to all counsel.

12. By this stipulation no party makes any admission regarding the present or future fitness or unfitness of Respondent as a prospective custodial parent. This stipulation represents the parties' temporary resolution of this case.

13. This stipulation does not limit the Petitioner's authority to intervene in or to provide services, including emergency protective services, to the Respondent and Margaret Moore on such grounds as provided in Title 41, MCA.

14. Margaret Moore, if she so choosed,

shall be allowed to visit the Curtis Foster Home from August 5, 1985, until August 19, 1985.

SUBSCRIBED to this 26th day of July, 1985.
STATE OF MONTANA, ex rel.
Department of Social and Rehabilitation Services, Petitioner.

By (Sig) Mullowney, Deputy County Attorney

FRANK B. FITZGERALD, Respondent.

(Sig) Fitzgerald, FRANK B. FITZGERALD

FRANK B. FITZGERALD, Respondent.

By (Sig) Renz, One of his attorneys.

DAMON L. GANNETT

(Sig) Gannett, Guardian ad Litem

(Original done on stationery of the law firm of Olsen, Christensen & Gannett)

ORDER

Pursuant to the Stipulation of all parties hereto, which Stipulation has been presented to this Court, this Court does hereby enter the following:

ORDER

1. IT IS HEREBY ORDERED that said stipulation is approved and that all par-

ties hereto conduct themselves in accordance with the terms of that certain Stipulation dated the 26th day of July, 1985;

2. IT IS FURTHER HEREBY ORDERED that the hearing on the Petition which has been filed herein is continued and postponed until further Order of the Court.

DATED this 13th day of August, 1985.

(Sig) Holmstrom, District Judge

IN THE ABSENCE FROM CHAMBERS

OF JUDGE SPEARE OF DEPT. NO. 4

EXHIBIT C of APPENDIX C (Typed Copy)

PSYCHOLOGICAL ASSOCIATES
RICHARD M. AGOSTO, Ph.D.
CLINICAL PSYCHOLOGIST
1215-24th St.W., Billings, Mt. 59102
406-652-1410

August 2, 1985

Mr. Damon L. Gannett
Attorney at Law
720 North 30th Street
Billings, Mt. 59101-0997

Re: MARGARET MOORE

Dear Damon:

I have now had the opportunity to evaluate and treat Margaret Moore over the past six weeks that she has been residing with Frank and Velma Fitzgerald in Billings. The actual visits occured over the dates of June 24th, July 1st, July 9th, July 16th and yesterday, August 1st of this year. My contacts have been directly with Margaret on a one-to-one basis and in addition I have spent some time with Frank and Velma Fitzgerald alone and with Margaret present as well. In addition, my activities surrounding this case have in-

volved some telephone contacts with you and other interestd parties such as Vince Matule of the Casey Foundation and Ken and Marilyn Curtis, Margaret's foster parents in Missoula. The total period of evaluation and treatment over the past six weeks has been about seven hours.

My initial visits with Margaret were to assess her intellectual and psychological state and observe some interaction of this thirteen year old with her natural father Frank and his wife Velma. Some formal testing was given to screen out any initial problems in learning or personal difficulties. The tests presented included the Immediate Test, the Reading Section of the Wide Range Achievement test - Revised, the Coopersmith Self-Esteem Inventory, a series of Human Figure and Family Drawings, and an Incomplete Sentences Blank (High School Form).

The initial screening showed that her mental development was close to that of a

fifteen year old as compared to a thirteen year chronological level. This mental development is indicative of some above average growth in her vocabulary and general information skills. In addition, her reading recognition or ability to pronounce words out loud was at the 61st percentile for her age. She will be entering the 8th Grade and she currently reads at a level which is more frequently seen in people who are completing an 8th grade education. In contrast, her emotional and social development was somewhat below what would be expected from the basis of her intellectual development and ability. She showed some characteristics of emotional and social growth which are typically seen by children closer to the 9 or 10 year age level. It should also be noted that Margaret is someone who has worked very hard at controlling herself and holding back many outward expressions of emotion and feeling. She showed some underlying confusion

and aggression but works very hard at maintaining her composure and self-control. This young teenager seemed to be expressing through the psychological tests even from the outset that she has not completely fit into any family or formed any lasting bond or attachment. When asked to draw her family, for example, the closest group that she identified with was the Curtis family. But even with that context, Margaret projects that she does not exactly fit in at this time. She badly wants to be a part of that group but recognizes that stress and difficulties facing her which have made her "different". In fact, she indicated that if she could change one thing about herself it would be that she would "have a normal family and be someone else".

In terms of her self-esteem scores on the Coopersmith Inventory, Margaret showed at the start of therapy that she felt quite comfortable with the home that she

was in specifically the Curtis home and was also getting along quite well in school and with her peers in Missoula. But even at the initial stages of treatment, she did have some difficulties in her own personal self-esteem experiencing some questions about her own competence, self-worth, significance and being somewhat insecure about her own self-approval. She was very outspoken about her fears of the possibility of living with the Fitzgeralds.

Thus, it was clear from the start of the evaluation and therapy meetings that Margaret is a very vulnerable young teenager who has not yet achieved a good level of stability and security. Her self-esteem is rather weak and could be easily disturbed to the point where we would see some regression and decompensation.

Over the time that Margaret was in the Fitzgerald home from the end of June up until the present she did show some signs

of increased stress and emotional pressure. Some indirect symptoms of emotional stress were noted through problems in sleep disruption, weight loss, feelings of helplessness and sadness, and increased levels of anger. She expressed some of her feelings both directly to me and also indirectly through some poetry and letters written to her friend and her foster family. She also reports that she is "tired all of the time" and this is often another sign of depression when there is no basis for the fatigue. She also felt that she was not to the point of any development of self-destructive ideas but was very upset. She saw some positive aspects of the six week visit with the Fitzgeralds including an opportunity to make some new friends in the area of Billings and to see some of her old acquaintances. However, meeting the "old people" that she knew before has brought up some unpleasant memories of her past stressful experiences when she was

living with her natural mother. This child is one who holds back much expression of feeling but reports that she has begun raising her voice but "not yelling" at Frank and Velma. She is obviously becoming more angry and also some of her anger has led to withdrawal from them and disruption of the communication within this group. She tends to avoid communication within this group. She tends to avoid communication at times because of the strain in their interactions.

In conclusion, therefore, it is my impression that Margaret Moore has suffered some identifiable impairment of her psychological functioning over the past few weeks. In addition, she is potentially at risk of greater levels of emotional stress and disruption should she be placed on a more permanent basis with the Fitzgeralds. In part, she has begun to show some diminished self-esteem and depressive anxious reactions due to some of the types of in-

teraction that she has had with Frank and Velma. Margaret perceives them, and primarily Velma, as being very critical of her, not accepting Margaret's feelings and as not being helpful to her in developing any constructive ways of dealing with difficulties. She also feels that rather than being able to draw from her exposure to Frank and Velma models of effective adult and mature behavior that she has to be more of a leader and more decisive than they are. It appears that the Fitzgeralds have not been very effective in helping Margaret maintain a good level of self-esteem and security by failing to realize some of her individual needs, reducing her self-respect, and not accepting her personal feelings as being real and failing to support their expression and existence.

It is clear that Margaret is a very vulnerable young teenager who could easily regress with continued levels of stress and disruption in her life. She is only

beginning to form some stability and additional sudden and drastic changes in her home placement could only hurt her even more from a psychological standpoint. The emerging and potential psychological harm could destroy her ability on a permanent basis to give and receive love. She also could form more of a negative self-evaluation and see herself as being inferior, anxious and depressed. With this continued type of pressure as been evidenced in the Fitzgerald home, we may even begin to see Margaret acting out in a more direct manner either through running away or some type of further personal and social regression. It would be my recommendation that she should remain placed with the Curtis family. For Margaret's sake, the Curtis family has begun to provide her with a very supportive and loving home. Remaining in the foster family would seem to give Margaret a very good chance in the future to show even further emotional de-

velopment and growth and to overcome some of her past problems which developed through the experiences she encountered in living with her natural mother.

Thank you for your continuing cooperation and interest in working with Margaret Moore. Please let me know if there is any additional information that you would need. As you will note, I am sending a copy of this letter to Mr. Jeffrey Renz, the attorney for Mr. and Mrs. Fitzgerald. Please feel free to share the information with the other parties involved including the court and representatives from Social and Rehabilitation Services. I would be most interested in providing any further service to Margaret if she returns to the Billings area.

Sincerely yours,
(Sig) Agosto, Richard M. Agosto, Ph.D.
Clinical Psychologist
RMA:sf
cc: Jeffrey Renz
Attorney at Law

APPENDIX D (Typed Copy)

IN THE DISTRICT COURT OF THE 13TH JUDICIAL DISTRICT OR THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF	)CauseNo DJ-79-188
	)FINDINGS OF
MARGARET GERALDINE MOORE	)FACT, CONCLUSIONS
	)OF LAW
Youth in Need of Care.	)AND ORDER

This matter has come on regularly in a series of proceedings and hearings held on the dates of September 11th, 1980, November 14th, 1980, April 15th, 1981, and April 24th, 1981, and finally became submitted to the Court for consideration upon completion of written briefing completed on June 5th, 1981. On the occasion of each hearing or proceeding, Calvin J. Stacey was present as counsel for Frank B. Fitzgerald; Robert J. Waller or W. Corbin Howard, Deputy County Attorney for the County of Yellowstone, was present as counsel for the Department of Social and Rehabilitation Services; and Damon L. Gannett, the duly appointed Guardian ad Litem and counsel for the above-named minor child, was

also present. Witnesses were duly sworn on behalf of all parties and the matter was submitted to the Court and, after due consideration, the Court now makes the following:

FINDINGS OF FACT

1. The Court has jurisdiction over all matters, persons and things involved herein.

2. Proper service of process in all matters of law regarding this action has been had on all persons involved and concerned herein.

3. That the parental rights of the natural mother of Margaret Geraldine Moore (hereinafter, "Margaret") have been terminated by previous action of this Court taken on April 3rd, 1980. A copy of the Memorandum, Conclusions and Order representing such action is attached hereto and incorporated herein for the historical information it provides concerning the child involved in this matter and her

prior family circumstances. <Note: See Exhibit A of Appendix C, App pages 28-47>

4. That the natural father of Margaret has heretofore been determined to be Frank B. Fitzgerald (hereinafter, "Frank"). He is 51 years of age. He and Margaret, aged 8 years, have never resided together or had any personal contact between them, except as hereinafter described.

5. That the natural mother of Margaret was diagnosed as an undifferentiated schizophrenic, and that Margaret spent the first five years of her life living in her custody. During that time, Margaret failed to develop normally as a child, and exhibited some of the characteristics found in schizophrenia. She also suffered from a failure to develop self-identity, having adapted to a role-reversal with her mother. During such five years, Frank was rejected by the mother in all contacts, and Margaret knew him only through the mother's revulsion to him and her identifica-

tion of him as the "kook".

6. That there is a statistically-established relationship between schizophrenia in parents and consequent development of schizophrenia in children, based upon genetic and environmenal factors.

7. That because of Margaret's genetic background, as well as the environment in which she lived for the first five years of her life, she is "at risk" to develop the mental illness of schizophrenia.

8. Margaret, in addition, is a very intelligent and particularly sensitive, fragile and chameleon-like young lady, for whom it is extremely important to provide a strong, stable adult female role model in order that she may develop normally from a girl into a young woman.

9. Frank is skilled in the field of electronics and is regularly employed with a good work record. He gets along with his fellow employees and is financially sound. He is a law-abiding citizen. He has never

been married, and the longest period o
close association with a woman has bee
seven months.

10. That Frank has a medical histor
which includes a diagnosis by the Veteran
Administration in 1963, as:

> ". . . schizophrenic reaction, undif-
> ferentiated type, in good partial remis-
> sion, manifested by some blunting o
> emotions, restricted interests, mentall
> competent . . ."

for which he receives a 70% disabilit
pension.

11. That Frank has also been diagnose
as a schizophrenic by Dr. Ned Tranel,
clinical psychologist, as of July 30th
1980. That conclusion is echoed by th
psychiatric nurse, Mary Honaker, who ha
had past contact with Frank in the cours
of working with Margaret and Margaret'
mother over the years since prior to Marg
aret's birth.

12. Frank has also been diagnosed a
having a schizotypal personality disorde
by Dr. Stephen Wagner, another clinica

psychologist. This is a condition which is said to make him less than ideal as a parent, but not to render him completely inadequate, making possible a trial period of closely monitored visitation between Frank and Margaret as an evidence-gathering device for a later determination as to custody.

13. In support of his efforts to secure custody of Margaret, Frank has also submitted to a 40-minute psychiatric examination interview with Dr. Thomas W. Van Dyk on or about July 15th, 1980. In his written report, Dr. Van Dyk found no major psychiatric disorder with Frank and recommended:

> ". . . that if no conflicting information turns up, Mr. Fitzgerald be given custody of his daughter . . ."

Frank did not apprise Dr. Van Dyk of his 70% disability rating for schizophrenic reaction, a fact which was upsetting to the Doctor, but not destructive of his conclusion, other than that his final

recommendation made at time of testifyi
was that a program of visitation betwe
Frank and Margaret be eased into, nothi
sudden, with the results to be check
after several months, so that actu
experience could settle the question as
how it would work out.

14. With respect to visitation, Fra
wants custody of Margaret outright, b
would yield with some reluctance to
introductory process of visitation. Ho
ever, if that produced a result demo
strating that his contact with her w
adverse to Margaret's best interests,
would still insist upon custody and purs
Court appeals to the highest forum f
that purpose. Such stated position
Frank adds to the confirmation appear
in other parts of his testimony, and
the testimony of other witnesses, th
Frank is able to function only in the se
vice of his own needs and is lacking
the ability to recognize, appreciate a

accommodate the needs of others or adapt to their exercise of any self-control in their own lives.

15. Efforts at accomplishing visitation between Frank and Margaret were recently made, and two meetings did occur. The results were described as a "smothering" by Frank of Margaret, with an adverse effect upon Margaret in the form of extreme fright, a five-pound weight loss, stress, and a regression in reality testing. As a consequence, visitation efforts were terminated.

16. That on the basis of the totality of the psychiatric and psychological examinations conducted of Frank, together with the other evidence adduced, it is clear that placing custody of Margaret with Frank would increase the risk of her becoming mentally ill by a probability greater than 50% at a minimun, in the view of one witness and to an almost certainty in the view of others. Because of the

demonstrated adaptive characteristics of Margaret, it is clear that a placement of her with Frank will clearly result in a loss of her own identity and development, and tip the already heavily-weighted scale of Margaret's future against her normal development.

17. Under the circumstances existing, it would be detrimental to the best interests of Margaret to defer a final decision with respect to her custody pending the implementation of further visits with Frank as an evidence-gathering measure, since the adaptive characteristics of Margaret would render the results untrustworthy and, also, because of Frank's determination to reject any results not favorable to his dispositions in any and all events. The status of the evidence clearly advises that the process of attempting further trial visitation would in itself be a destructive one from Margaret's standpoint.

18. Under the circumstances existing,

it would also be detrimental to the best interests of Margaret to be placed in the permanent custody of Frank.

From the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

1. That the Court has jurisdiction over all matters, persons and things involved herein and proper service of process has been had on all persons involved and concerned herein.

2. That the challenge of Frank B. Fitzgerald to the constitutionality of the Uniform Parentage Act has not been supported by any adequate authorities and is without merit.

3. That the motion of Frank B. Fitzgerald requesting an order establishing visitation with Margaret Geraldine Moore should be denied.

4. That it is in the best interest of Margaret Geraldine Moore that she be placed in the custody of the Department of

Social and Rehabilitation Services of the State of Montana, and that the parental rights to Margaret Geraldine Moore with Frank B. Fitzgerald should be terminated on the ground and for the reason that it would be detrimental to her best interests to be placed in his custody.

In view of the foregoing Findings of Fact and Conclusions of Law, the Court now makes the following:

O R D E R

IT IS HEREBY ORDERED as follows:

1. That permanent custody of Margaret Geraldine Moore is granted to the Department of Social and Rehabilitation Services.

2. That the parental rights to Margaret Geraldine Moore of Frank B. Fitzgerald are hereby terminated.

3. That the motion of Frank B. Fitzgerald to dismiss the proceedings on the ground that the Uniform Parentage Act is unconstitutional is DENIED.

4. That the motion of Frank B. Fitzgerald requesting an order for establishing visitation with Margaret Geraldine Moore is DENIED.

5. That the Clerk of the above-entitled Court shall give notice hereof pursuant to Rule 77(d) of the Rules of Civil Procedure.

DATED: June 29th, 1981.

(Sig) Charles Luedke, District Judge.
cc: County Attorney
Damon L. Gannett
Calvin J. Stacey

APPENDIX E-A <Typed copy>

39 <Montana> STATE REPORTER 2191
<Also see 654 P2 994>

NO. 81-523

IN THE MATTER OF M.G.M.,
YOUTH IN NEED OF CARE
Submitted: Sep. 17, 1982
Decided: Dec. 9, 1982

CHILDREN, Appeal by Natural Father from Order Terminating Parental Rights, Whether it was error to Apply the "Best Interest of the Child" test rather than the "Abuse and Neglect" Standards, Whether there is Clear and Convincing Evidence to support either Test, Whether a psychiatric Nurse was qualified to give an expert opinion and diagnosis of Appellant's mental health

Appealed from the 13th Judicial District Court, Yellowstone County, Hon. Charles Luedke, Judge

For Appellant: Patten and Renz, Billings

For Respondent: Olsen, Christensen and Gannett, Billings. Harold F. Hanser, County Attorney, Billings

Jeffrey Renz argued the case orally for

Appellant; Mr. Damon Gannett <Guardian Ad Litem>; Mr. Stephen Rowinski, Deputy County Attorney, for Respondent <gave no oral argument>.

Opinion by Justice Morrision; Justices Harrison, Shea, Weber and Sheehy concurred.

Reversed and remanded <for further findings>

Mr. Justice Morrison, delivered the Opinion of the Court.

Frank Fitzgerald, the natural father of the child, M.G.M., appeals from a judgment issued by the District Court of the 13th Judicial District, Yellowstone County, terminating his parental rights.

The child, M.G.M., was born out of wedlock on June 10, 1972. She lived solely with her mother until 1979, when the Department of Social and Rehabilitation Services (SRS) placed her in a foster home. In April 1980, the mother's parental rights were terminated.

When appellant discovered the proceedings to terminate the mother's parental rights, he filed an acknowledgement of paternity of the child and sought unsuccessfully to intervene in the proceedings.

On May 28, 1980, SRS filed a petition for temporary investigative authority and protective services, claiming that M.G.M. was in danger of being abused and neglected by the appellant. The District Court granted the petition. Appellant was not allowed contact with the child except by recommendation of mental health worker and psychiatric nurse, Mary Honaker. The District Court also ordered appellant to undergo a psychological evaluation.

In July 1980, appellant was allowed to meet with his child for the first time. Two one-hour sessions were held under the supervision of Mary Honaker. The meetings were then discontinued because the child appeared upset and frightened by her father.

On September 11, 1980, the guardian ad litem for the child filed a petition to determine paternity and to determine whether appellant's parental rights should be terminated under the provisions of the Uniform Parentage Act specifically section 40-6-130, MCA. On September 23, 1980, SRS filed a petition under section 41-3-401, MCA, asking that M.G.M. be declared dependent and neglected, and requesting permanent custody and authority to assent to adoption. Over objections by appellant, the District Court consolidated the proceedings brought by the guardian and the SRS.

On November 14, 1980, pursuant to section 40-6-111, MCA, the District Court declared that appellant was the natural father of M.G.M.

A series of hearings were then held. Nearly all of the evidence at these hearings pertained to the mental health of the child and her father.

Based on the testimony at the hearings, the District Court made the following significant findings of fact:

"5. That the natural mother of M.G.M. was diagnosed as an undifferentiated schizophrenic, and that M.G.M. spent the first five years of her life living in her custody. During that time, M.G.M. failed to develop normally as a child, and exhibited some of the characteristics found in schizophrenia. She also suffered from a failure to develop self-identity, having adapted to a role-reversal with her mother. During such five years, Frank (appellant) was rejected by the mother in all contacts; and M.G.M. knew him only through the mother's revulsion to him and her identification of him as the 'kook'.

"6. That there is a statistically-established relationship beteeen schizophrenia in parents and consequent development of schizophrenia in children, based upon genetic and environmental factors.

"7. That because of M.G.M.'s genetic background, as well as the environment in which she lived for the first five years of her life, she is 'at risk' to develop the mental illness of schizophrenia.

"8. M.G.M., in addition, is a very intelligent and particularly sensitive, fragile and chameleon-like young lady, for whom it is extremely important to provide a strong, stable adult female role model in order that she may develop normally from a girl into a young woman.

"9. Frank is skilled in the field of electronics and is regularly employed with a good work record. He gets along with his fellow employees and is finan-

cially sound. He is a law-abiding citizen. He has never been married, and the longest period of close association with a woman has been seven months.

"10. That Frank has a medical history which includes a diagnosis by the Veterans Administration in 1963, as '. . . schizophrenic reaction, undifferentiated type, in a good partial remission, manifested by some blunting of emotions, restricted interests, mentally competent . . .'

"for which he receives a 70% disability pension.

"11. That Frank has also been diagnosed as a schizophrenic by Dr. Ned Tranel, a clinical psychologist, as of July 30th, 1980. That conclusion is echoed by the psychiatric nurse, Mary Honaker, who has had past contact with Frank in the course of working with M.G.M. and M.G.M.'s mother over the years since prior to M.G.M.'s birth.

"12. Frank has also been diagnosed as having a schizotypal personality disorder by Dr. Stephen Wagner, another clinical psychologist. This is a condition which is said to make him less than ideal as a parent, but not to render him completely inadequate, making possible a trial period of closely monitored visitation between Frank and M.G.M. as an evidence-gathering device for a later determination as to custody.

"15. Efforts at accomplishing visitation between Frank and M.G.M. were recently made, and two meetings did occur. The results were described as a 'smothering' by Frank of M.G.M., with an adverse effect upon M.G.M. in the form of extreme fright, a five-pound weight loss, stress, and a regression in reality testing. As a consequence, visitation efforts were terminated.

"16. That on the basis of the totali-

ty of the psychiatric and psychological examinations conducted of Frank, together with the other evidence adduced, it is clear that placing custody of M.G.M. with Frank would increase the risk of her becoming mentally ill by a probability greater than 50% at a minimum, in the view of one witness, and to an almost certainty in the view of others. Because of the demonstrated adaptive characteristics of M.G.M., it is clear that a placement of her with Frank will clearly result in a loss of her own identity and development, and tip the already heavily-weighted scale of M.G.M.'s future against her normal development.

"17. Under the circumstances existing, it would be detrimental to the best interests of M.G.M. to defer a final decision with respect to her custody pending the implementation of further visits with Frank as an evidence-gathering measure, since the adaptive characteristics of M.G.M. would render the results untrustworthy and, also because of Frank's determination to reject any results not favorable to his dispositions in any and all events. The status of the evidence clearly advises that the process of attempting further trial visitation would in itself be a destructive one from M.G.M.'s standpoint.

"18. Under the circumstances existing, it would also be detrimental to the best interest of M.G.M. to be placed in the permanent custody of Frank."

The District Court then concluded as a matter of law that it would be in M.G.M.'s best interest to place her in the custody of SRS, and that appellant's parental

rights be terminated.

Appellant has raised the following issues for review:

(1) Whether the District Court erred by applying the "best interests of the child" test in section 40-6-130 (1), MCA, instead of the "abuse and neglect" standards in sections 41-3-401, et seq., MCA?

(2) Whether there is clear and convincing evidence to support either the "best interests of the child" test or the "abuse and neglect" test?

(3) Whether psychiatric nurse, Mary Honaker, was qualified to give an expert opinion and diagnosis of appellant's mental health?

Appellant claims that sections 40-6-128 and 40-6-130, MCA, should not have been applied to him, and that the District Court therefore erred by terminating his parental rights absent any findings of abuse or neglect. We agree and remand for further findings.

Here, the District Court apparently applied the "best interests of the child" standard from section 40-6-130 (1), MCA. Section 40-6-130 (1), MCA, provides in part:

> "If the court finds it would not be in the best interests of the child to grant custody to the putative father, the shall terminate his rights to the child."

Section 40-6-128 (1), MCA, describes when the "best interests of the child" test should be applied to a putative father:

> "If a child is born out of wedlock and the mother executes or proposes to execute a release terminating her rights to the child or if the child otherwise becomes the subject of an adoption proceeding, the agency, person to whom the child has been or is to be relinquished, or the mother or person having custody of the child shall file a petition in the district court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by the court. The court shall hold a hearing as soon as practical to determine the identity of the father and to determine or terminate the rights of the father as provided in this section and 40-6-129 and 40-6-130 . . ." (Emphasis added.)

The key language here is, "or if the child otherwise becomes the subject of an adoption proceeding." Respondents claim that when the mother's rights were terminated, the child became subject to a "potential adoptive proceeding". Admittedly, however, SRS is seeking temporary custody on the grounds that M.G.M. is a youth in need of care and neglected or abused within the meaning of section 41-3-4401, et seq., MCA. As such, the provisions governing a "youth in need of care" proceeding must be controlling.

Moreover, section 40-6-128, MCA, did not give the guardian of the child the right to petition for termination of the appellant's parental rights. Only "the agency, person to whom the child has been or is relinquished or the mother or the person having custody" may file a petition for determination of a putative father's rights. The District Court erred by consolidating the guardian's petition with

that of SRS.

It is well-established that absent findings of abuse or neglect based upon clear and convincing evidence, parental rights may not be terminated. Matter of Guardianship of Doney (1977), 174 Mont. 282, 570 P2 575; In re the Matter of J.L.B. (1979), 182 Mont. 100, 594 P2 1127; and Stanley v. Illinois (1972), 405 US 645, 92 S.Ct.1208, 31 L.Ed2 551. These constitutionally protected parental interests in the child are not weakened by the fact that a child is born out of wedlock. Matter of J.L.B., 594 P2 at 1136, referring to Stanley v. Illinois, 405 US 651-652, 92 S.Ct. at 1213, 31 L.Ed2 at 559.

Further, this Court has held that a finding of abuse, neglect, or dependency "is the jurisdictional prerequisite for any court ordered transfer of custody." In re Gore (1977), 174 Mont. 321, 570 P2 1110, 1113.

Only <u>after</u> a showing of dependency,

abuse, or neglect, is the "best interests of the child" test the appropriate basis for determining custody. See Doney, supra; Gore, supra; Henderson v. Henderson (1977), 173 Mont. 429, 568 P2 177; and In the Matter of Guardianship of Ashenbrenner (1979), 182 Mont. 540, 597 P2 1156, 1162.

Therefore, the District Court here was obligated to find that the child was a "youth in need of care" and abused or neglected in order to deprive appellant of custody and terminate his rights. Section 41-3-102, MCA, provides the applicable definitions:

> "(2) An 'abused or neglected child' means a child whose normal physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.
>
> "(3) 'Harm to a child's health or welfare' means the harm that occurs whenever the parent or other person responsible for the child's welfare:
>
> "(a) inflicts or allows to be inflicted upon the child physical or mental injury, including injuries sustained as a result of excessive corporal punishment;
>
> "(5) 'Threatened harm' means imminent risk of harm.

> "(8) 'Mental injury' means an identifiable and substantial impairment of the child's intellectual ~~or~~ psychological functioning."

During appellate argument, the guardian for the child admitted that the District Court had not made any findings that the child was abused or neglected by appellant. The findings only determined the child's best interests. More importantly, these findings do not provide a sufficiant basis on which to conclude that the child would be in danger of "imminent risk of harm" if she lived with or visited with appellant. We therefore remand this case for further findings.

On remand, the opinion of the psychiatric nurse that appellant is suffering from schizophrenia should not be admitted without further foundation. We agree that the determination of a person as an expert is within the discretion of the trial court, and can be set aside only upon abuse of discretion. Goodnough v.

State (1982), ___Mont.___, 647 P2 364, 39 St.Rep. 1170. Rule 702, M.R.Evid. Nevertheless, nothing in this record suggests that the nurse has had the training, experience, or education to diagnose schizophrenia. See Jenkins v. US (1962), 307 F2 637.

The District Court judgment is reversed and remanded for further findings.

APPENDIX E-B <Typed Copy>

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 81-523
IN THE MATTER OF M. G. M.

Youth in Need of Care.

O R D E R

PER CURIAM:

Appellant Frank Fitzgerald has filed herein his motion for a stay of the judgment of the District Court in Cause # DJ-79-188, in the District Court of the 13th Judicial District of the State of Montana, in and for the County of Yellowstone. The Court has examined and considered the same.

IT IS NOW ORDERED:

(1) Respondent and all other interested parties, and each of them, are granted 20 days from the date hereof in which to prepare, file and serve any response or objection to appellant's motion.

(2) The judgment of the District Court of the 13th Judicial District of the State

of Montana, in and for the County of Yellowstone in that cause entiled "In the Matter of M.G.M.", the same being Cause #DJ-79-188, is hereby stayed until further order of this court.

(3) The Clerk is directed to mail a true copy of this order to the Department of Social and Rehabilitative Services of the State of Montana, to all attorneys of record for any parties in this cause, and to the Clerk of the District Court of the 13th Judicial District of the State of Montana, in and for Yellowstone County.

DATED this 15th day of April, 1982.

For the Court

(Sig) Haswell, Chief Justice
Filed Apr 15 1982
Thomas J. Kearney
Clerk of Supreme Court
State of Montana

APPENDIX E-C <Typed Copy>

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 81-523
IN THE MATTER OF M. G. M.

Youth in Need of Care.

O R D E R

PER CURIAM:

Appellant Frank Fitzgerald has filed herein his motion for a stay of judgment and visitation rights pending appeal. The guardian ad litem and counsel for the youth has filed his response to said motion. The Court has examined and considered the same.

IT IS ORDERED:

(1) The order of the District Court dated July 23, 1981, is stayed pending appeal.

(2) The request of Frank Fitzgerald for visitation of the youth pending appeal is denied at this time without prejudice.

(3) Any further applications for visitation of the youth shall be filed with the

District Court who shall retain jurisdiction to decide the same pending appeal.

DATED this 13th day of May, 1982.

For the Court

(Sig) Haswell, Chief Justice
Filed May 13 1982
Clerk of Supreme Court
State of Montana

APPENDIX F (Typed Copy)
(Cause refers to 81-523 and DJ-79-188)

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 83-120

STATE OF MONTANA, ex rel.
HAROLD HANSER, County Attorney
Yellowstone County, Montana,
Petitioner,

v.

THE DISTRICT COURT OF THE
13TH JUDICIAL DISTRICT
In and For the County of
Yellowstone, THE HONABLE
WILLIAM J. SPEARE, and THE
HONABLE CHARLES LUEDKE,
District Judges, and HARDIN
TODD, Clerk of the District
Court, 13th Judicial District,
Defendants.

ORDER

PER CURIAM:

The petition for writ of review or other such appropriate writ, or in the alternative, the petitioner's motion for suspension of appellate rules of civil procedure and petition for rehearing is denied.

The Clerk of the Supreme Court is directed to mail a true copy hereof to counsel of record for all parties.

DATED this 28th day of April, 1983.

(Sig) Haswell, Chief Justice
Justices Harrison, Shea, Morrison, Weber, Sheehy, Gulbrandon, concurring
Filed APR 28 1983
Ethel M. Harrison, Clerk of Supreme Court
State of Montana

APPENDIX G (Typed Copy of Notorized Statement)

20 September 1987

To Whom It May Concern,

This statement concerns Margaret Geraldine Moore, as known to me when we, Jim & Rhoda Phillips, became her foster parents, 10 April 1979 at 12 Riley Drive, Billings, Mt. 59101.

When Margaret first came to live with us, she related well to Rhonda, my daughter, & I, but it took her a couple of weeks to relate well with Jim. We contributed this to the fact that she had not had a male influence in her home. She missed her mother and Velma very much, and would talk about things they had done. She missed her 2 dogs & had many tales tell of their fun. She also talked of her good friends Timmy, Rose & Bob. She was very expressive, & she had her own opinions in which she expressed freely. She also expressed herself through her drawings,

poetry and by putting on little skits for us. She was a beautiful, sweet, unspoiled child, who loved people & enjoyed doing things with them & for them. She was very loyal & protective of her loved ones. She was a very brilliant child. When they tested her I.Q. in 1980, she test 2 or 3 years above her age.

Rhonda taught Margaret sign language, and on Mother's Day 1981, Rhonda played the piano, Margaret signed as they sang "The Rose". It was beautiful.

Margaret enjoyed helping prepare meals. Her specialty was tuna fish sandwiches. The first time she baked cookies, she was upset because they were eaten so quickly. I told her, she should be happy because if they weren't good no one would have eaten them. That made her happy. She always wanted to help fix meals. She would peel potatoes, not fast, but she'd get it done. She liked to clean, dust & vacuum. She'd say "Can I vacuum?", I'd say "If you want

to." And although the vacuum was almost as big as she was, away she'd go.

She loved to clean & dust. She always make her bed & was neat & tidy with her personal things.

I loved her as my daughter & it was a deep hurt to me when they took her away the 17 October 1981. She is still deeply imbedded in my heart.

My husband, (ex husband now) Jim is an alcoholic. We had some very traumatic times.

After two of our little foster daughters were adopted at Christmas 1980, Jim seemed to get worse. He was very mean, verbally, sarcastic, & insinuative. He would make nasty remarks such as, "Which one are you going to Fu-- this time?" refering to Rhonda, my daughter, Margaret, my foster daughter & Kevin, my foster son. These type of questions were made in the presence of the children many times.

He, Jim, mentally abused us all, but

mostly me. I felt as long as he was harassing me, he was not bothering the children. I feel now that I was sicker than he was. I was depressed to the point of suicide. I hid in closets or any place where I could get away from him for just a short time. He would follow me everywhere, even to the bathroom, & talk, talk, talk. He was like a broken record. I would know what he was going to say before he'd say it. It seems my mind was in a constant turmoil. He had followed me around like this for days it seemed, I'm not sure how long, but not less than 3 days, maybe more. Home life was Hell, full of tention & fear. I was afraid to talk to the kids or they to me, because a simple thing such as "How many eggs do you want?", would set Jim off on one of his verbal tirades.

One day, while he was cleaning his shot gun at the kitchen table as I was doing dishes, he seemed more sobber than usual, I suggested he commit himself for treat-

ment. Of course he said there was nothing wrong with him & he could quit drinking anytime he wanted to. I said that if he didn't commit himself then I would see if I could get him committed. He jumped up & stuck the gun against my stomache & said, "If you try I'll blow your guts out.", & pulled the trigger. It wasn't loaded, but it terrified me so much that I hit him along side the head with a fry pan I had in my hand. He looked surprised & said, "Why did you hit me?" in a voice of confusion. I told him why, but he wouldn't believe me. It was another talk all day, day. By the time the children arrived home from school, I was in my usual state of insanity. I was always glad to see them come home, because Rhonda could sometimes draw him away from me, but this day, no way. The only time he'd leave me alone was when he'd go out to the barn for another drink.

After our evening meal we went out to

clean the yard & he just followed me around talking. I hated the sound of his voice. I just wanted to stop it any way I could. I told him to leave me alone for awhile. He'd say whats the matter with you. I tried to get away from him, but he'd just follow me every where. Rhonda & Kevin tried to get Jim to help them, he yelled at Kevin & shoved Rhonda, this was the first physical violent act I'd seen toward Kevin & toward myself but not toward Rhonda. When he shoved Rhonda & started talking to me again, I was so angry & full of hate I took the pushbroom I was sweeping the walk with & hit him on the shoulder & side of the face & head. It knocked him down, I ran into the house, grabbed the wall phone & was going to call the police to come & get Jim, I couldn't take any more. Jim came in, put his hand on the cradle-I hit him on the left cheek with the hand piece as hard as I could & ran upstairs. I started to dial the desk

phone. He came up & pushed the button down. I beat his hand several times with the handpiece, he just smiled & said "What is the matter with you, are you crasy?" I guess I was. I ran to Kevins bedroom, got his 22 rifle, levered a shell into the chamber at stood in the door waiting. The kids-all 3-had come upstairs & were talking to Jim. Then the kids and Jim started toward me. I said, "If you come any closer I'll kill you." The kids stopped & said "Don't mom," they kept talking, but I didn't listen. Jim said "Go ahead, I don't care." I pulled the trigger, but I aimed it just above his head, I couldn't kill him after all. Kevin & Jim took the gun from me. Then crying I ran outside. It was dark by then, I hid in some bushes before the came out looking for me. I then smeaked away at went about 3 blocks to an AA helper, but he wouldn't help me. I returned home because I was afraid of what Jim might do to the kids.

I wasn't allowed to go anywhere alone. I had to take someone with me at all times.

Jim got a ranch job about 3 miles out of Fromberg. He promised he'd change. So we moved there in April 1981. While in the process of packing, Jim got angry with Rhonda, threw her on the floor & threatened to bash her face in. I hit him with a regular broom I was sweeping the floor with.

After we'd moved to Fromberg he became more physically & mentally abusive. One day Margaret had fallen in the gravel & some of the gravel was imbedded in her knee. Rhonda was cleaning Margarets knee in the bathroom. Jim went in. He laughed at Margaret, called her a bawl baby, because she was crying, then slapped her on the knee. Rhonda told Jim to leave Margaret alone & tried to push him out of the bathroom. Margaret ran out & took off running down the road crying. Kevin caught up with her, we drove down, got her, returned

to the house & I finished taking care of her knee. Then Jim became threatening & nasty. I told the kids quietly to go get in the car & to take a change of clothes. I kept Jim busy while they did this. Then I ran, jumped in the car & took off. We went to Fromberg with Jim following in his pickup. I tried to find the Sheriff, couldn't find him so we headed for Bridger, 16 miles away. Jim was trying to run into the back of us. He looked wild - his hair flying, laughing, even taking his hands off the steering wheel & wave them. We were going from 70 to 90 miles per hour. At one time I slowed for a curve, Jim drove up beside us & tried to push us off the road. I slammed on my brakes to keep him from hitting us. Then he wouldn't let up pass. We caught up with another car. We got past Jim & other car & let the other car follow us into Bridger, about 2 miles. Kevin got out & called the HPD. When the Highway Patrolman showed, we ex-

plained to him the situation. He stalled Jim & we four went to Red Lodge - letting loose all our fears, tentions & anxieties. Rhonda & Margaret had bad dreams about that for quite sometime.

There were so many things everyday until we, the children & I, on the pretense of going to an Alanon & Alateen meeting, were able to get away and go to my Folks in Jordan, Mt. With the help of Peggy Smith & Mary Honaker, Jim committed himself for treatment at Galen, Mt. The Drs. told me that they figured a large percentage of the time, Jim was doing these things he was in black out periods.

Jim never lived at our house again. He came for visits a few times. He came up drunk one night, began being abusive. I sent Margaret to the neighbors. Rhonda & Kevin kept out of his way. I called the police department. They locked him up in jail overnight. He never came back.

After Jim left for Galen, the kids & I

moved to Bridger, Mt. 2 May 1981.

In Conclution:

Margaret was a sweet an impressionable child. She would do anything to please those around her even if she did not always agree. She was loyal to those she lived with & loved ones. Even though she feared Jim she work her little heart out to please him or wait on him when he'd ask for a drink, bring me this or that. She was very loyal to Rhonda, Kevin & I. We were her family. If we felt sad, Margaret seemed to be the first to realize it & be there with a hug & a comforting word. Margaret had some good experiences and bad experiences while living with us. They could have had various effects on her as she grew older.

Notary Seal. (Sig) Rhoda Phillips
Subscribed & sworn this 21st day of Sept. 1987. N. Carol Watson, NOTARY PUBLIC for the State of Montana, Residing at Jordan, Montana. My Commission Expires Feb. 10, 1988

Rhoda Phillips, Box 96, Jordan, Mt. 59337
Phone 557-2393

87-1582

No. _____

OCTOBER TERM 1987

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

FRANK BORING FITZGERALD,	)
APPELLANT,	)
vs.	)
STATE OF MONTANA, DEPARTMENT	)
OF FAMILY SERVICES,	)
GENE HUNTINGTON, DIRECTOR	)
RESPONDENT. 1/	)

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA 2/

APPENDICES PART 2 OF 2 PARTS

APPEARANCE: FRANK BORING FITZGERALD
3000 HALLOWELL LN
BILLINGS, MT 59101
406-259-5866
APPELLANT, PRO SE

1/ FORMERLY DEPT. SOCIAL & REHABILITATIVE SERVICES, DAVE LEWIS, DIRECTOR.
2/ CASE BELOW, 86-538, IN RE: MGM, YOUTH IN NEED OF CARE. 741 P2 770.

88 pp

APPENDICES PART 1

A...86-538 3rd appeal.....apl-12

B...Reh. Den. 86-538.....apl3

C...Sept 2, 1986 Decision.....apl4-65

D...June 29, 1981 Decision.....ap66-77

E-A...81-523 1st appeal.....ap78-91

E-B...81-523 1st Stay Order.....ap92-93

E-C...81-523 2nd Stay Order.....ap94-95

F...83-120 2nd appeal.....ap96-97

G...Phillips Statement.....ap98-108

APPENDICES PART 2

H...Birth cert substituted.....apl09-110

I-A...Van Dyk Report.....apl11-126

I-B...Earlier Van Dyk Report.....apl27-131

J...Mt & US Cons quotes.....apl32-138

K...Case Flow Chart.....apl39-146

L...MCA-40,41, USCS-25 quotes....apl47-191

M...proof of fictitious name.....apl92-193

N NOTICE OF APPEAL ap 194-195

APPENDIX H (Typed Copy)

IN THE DISTRICT COURT OF THE 13TH
JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF	)Judge
	)William J. Speare
MARGARET GERALDINE MOORE	)No. DJ-79-188
	)
Youth In Need of Care	)* O R D E R *

Pursuant to Respondent's request, and in conformity and compliance with provision, at Title 40-6-116(2), MCA (1985), and for good cause appearing.

IT IS HEREBY ORDERED that the Department of Health and Environmental Science, State of Montana, shall prepare a substitute Certificate of Birth, under 40-6-123, MCA (1985) for the above named youth, listing as father FRANK BORING FITZGERALD; age of her father at time of birth as 42; State of his birth as Missouri; which listing is consistent with the Findings of the Court in this matter, dated November 17, 1980.

DATED this 23 day of September, 1986.

(Sig) Speare, District Judge

cc: Frank Fitzgerald

Damon Gannett

Greg S. Mullowney

Department of Health & Environmental Sciences

CERTIFICATE OF SERVICE

APPENDIX I-A (Typed Copy)

THOMAS W. VAN DYK, M.D. P.C.
Plaza West Professional Building
1537 Avenue D #320
Billings, Montana 59102
(406) 248-7299
Practice Limited To Psychiatry

May 1, 1985

William J. Speare
District Judge
P.O. Box 35,029
Billings, MT 59107

RE: Margaret Moore

Dear Judge Speare:

I am writing to you concerning my evaluation of Frank Fitzgerald, his family situation and Margaret Moore. I will divide my report into sections. The first section, I will discuss my evaluation of Frank Fitzgerald. This evaluation included interview material, historical material provided by medical records, historical material provided from Frank's mother, and my observations of Frank during his visits with Margaret Moore. The second section will be my evaluation of Velma, Frank's wife of two and a half years and Marga-

ret's godmother. The third section will be my evaluation of Frank's relationship to his daughter and doing the four visits in which I observed them. The fourth section will be my evaluation of Margaret Moore, a statement as reported of me of her desires; and, I would like to, as a final section, make recommendations to the Court.

In addition to my evaluation of Frank Fitzgerald for the first Court hearing, I have examined Frank on August 31, September 7, September 13, and September 20 of 1984. In addition, I have observed Frank during visits with his daughter, Margaret, on four occasions. I have seen him for one additional visit. I have reviewed Frank's medical history and a report of the psychological evaluation provided by Dr. Viraldi, Dr. Tranel, and Dr. Wagner. Mr. Fitzgerald is a fifty four year old, white male, who is presently married. He has been married for two and a half years. He

has known his present wife for thirteen years. They were introduced as neighbors. They had some social contact and a one year courtship. Mr. Fitzgerald has married Margaret's godmother. He met her when she brought a birthday card for Margaret over to the house. Mr. Fitzgerald reports that he injured his shoulder last September and retired. He plans, eventually, to return to work; but, at the present he is concerned with house projects, tree trimming, septic systems. He lives at the northwest corner of Optimist Park at 3000 Halowell Lane. He has had no conflicts with the neighbors. In fact, he will often take care of their properties when they are gone. He has had no trouble with the law. His only offense being, having a license sticker that wasn't posted in time. He states that he has a good relationship with his wife. They have no physical fights. They have arguments which are resolved with effort. They have a good sex-

ual relationship and a mutual admiration of each other.

He sleeps well. He goes to sleep quickly and wakes after two or three hours to go to the bathroom. He goes back to sleep promply. He has a good appetite. He has some depressed moods, which are short but intense. He has a lot of hope for the future; especially, he has hope for obtaining custody of his daughter, Margaret. I asked him about hallucinations. He says that he sometimes has "blanking spells." They are short and sometimes involve visual changes. He has some hearing sensitivity, which can change from one ear to another. These symptons cause no interference with his life. I asked him about suspiciousness. He has some suspicion of the guardian ad litem, in this case, Damon Gannett. He realizes that his suspicions are probably not accurate. He has a feeling of apprehension often, but not fear or nevousness. He would like to get on with

the case and have it settled. He does not have any symptoms of projection. He has had several instances where he has felt that he has received "telepathic information". (I feel, professionally, unable to evaluate these incidents.) He has lost his surroundings on three or four occasions and seen a short vision at that time. He has had temper spells, occasionally, when he becomes frustrated when things do not work well.

I asked Frank, then, to provide me some history of his family. Frank states that his father was hit by a golf club before 1928. He suffered a head injury and had to have eighteen pieces of bone removed from his skull. His father was married in Los Angles in 1928; and, Frank was born in Kansas City. When Frank was two years old, he returned to California. The birth was a normal one, at home, attended by a doctor and a midwife. Frank's mother states that Frank got along with other children well.

During Frank's growing up years, his father worked nights. Frank was a child who would not fight with other children. Frank's mother reports that Frank did well in high school. He participated in the high jump and that he had plenty of male friends. He had a girlfriend named Elsie, who, has since, died of cancer. That he often worked on old cars, and went on double dates. Frank received the Bausch and Lomb Honorary Science award in high school. He went to work one day out of high school in Paso Robles, California. His mother noted no psychological difficulties. Frank was reported having done chores willingly and having raised rabbits. He want into the army after attending college. He became ill, and then had an auto accident after induction. He had to have nine stitches in his head. A truck and trailer ran a red light and hit him. An electroencephalogram, at that time, did not show any trouble. Two other electro-

encephalograms were abnormal. He had normal spinal tap. He had excited and erratic behavior. He had electroconvulsive therapy, electric subconvulsive therapy and insulin shock therapy. With, or in spite of all of this, his bahavior finally settled down and he was dismissed. He had a diagnosis of schizophrenia and was eventually given a disability for this. After leaving the army, he tried to get his job back, but was unable to do so. He went to college and obtained reasonable grades. After graduation, he worked steadily until retirement. He has had three close personal relationships with friends. He has not undergone any further deterioration.

Mental status examination: Frank has adequate orientation, fund of information, memory and intelligence. His verbal and motor behavior appear to be within normal limits. His mood is, somewhat, limited in range; but, otherwise normal. I do not see any evidence of psychotic symptoms. He

does describe very transient spells of visual spells, blacking out, intensification of sound, visions of telephone poles or brighter colors. I feel that these are organic symptoms either from his head injury as a child or residuals of his electro shock treatment or insulin coma. He does not have any of the classic symptoms of depression or schizophrenia such as paranoia, delusions, hallucinations, suspicious behavior. Frank's judgment appears to be intact. It is my impression that he suffers, at the present time, no psychiatric disorder.

My evaluation on Velma Fitzgerald. Velma is somewhat obese, middle aged woman, who has been married to Frank Fitzgerald for two and a half years. She appears to care very much for Frank and for Margaret; and, to be very attached to them both. She is an active participant in Frank's attempt to get custody of Margaret. Velma has had no significant medical problems. She does

not drink or smoke. Her sister was a resident at Warm Springs after an injury while working at the Lewis and Clark Caverns. However, Velma states that Dr.Xanthopoulos insits that there is nothing wrong with her. Her sister, presently, works as a housekeeper in Wyoming.

Mental status examination: Velma appears to have adequate orientation, fund of information, memory and intelligence. Her verbal and motor behavior are within normal limits. Her affect and range is completely normal. There are no psychotic symptoms. Her judgment and insight are intact. He has no psychiatric disorder.

The relationship between Margaret, Velma and Frank. I saw them together for four visits. I noticed a definite improvement of the relationship during the four visits. The visits began awkwardly. There was some tension with the examiner present. Two of the visits were at the hospital in the Day Room at Two North. At times, I

would ask members of the family questions; or, at times, I would observe their interaction while they would talk together or put together simple puzzles. The pattern that I noticed was improvement between visits one and four, in Frank and Velma's comfort in dealing with Margaret, and Margaret's comfort and satisfaction in dealing with them. I had lunch with the family, hoping that a more informal atmosphere would provide more information. I noticed no change in their behavior. I, also, saw them for a fourth visit in my office. During these visits, I noticed that Margaret and Frank are very much alike in their intellectual abilities and their interests. Velma and Frank have attempted to provide for Margaret, things that they are interested in. They have taken her to restaurants and fixed meals at home. They have attempted to get Margaret to help with the cooking. They have provided Margaret with access to their

computer. They have attempted to demonstrate their caring and interest in Margaret's life in every way. They have not appeared to go overboard on this; but, they have done a reasonable job of trying to get along with Margaret. I have encouraged them, during the visits, to accept Margaret as she is and where she is and try to work with her on developing a relationship. During these visits, Margaret appears to have become more interested in Velma and Frank. She seems to enjoy bantering with them about intellectual subjects. I notice no disruptive behavior such as scolding, anxiousness, tension and fighting, hitting, inappropriate touching, or any other destructive or inappropriate social behavior. it appears to me that Frank and Velma are <u>inexperienced</u> parents; and, there is a need for them to have more time for Margaret, in order to better relate to her. They are not in touch with what girls, Margaret's age, are interested

in and satisfying this; but, they have been learning rapidly from their visits with Margaret. One of Margaret's main concerns during the visits, was the size of Frank and Velma's house; and, that she would have to sleep in the kitchen or on the couch. During the visits, which Margaret stayed over night, apparently this was accomplished without problem.

During the first visit that I had with Margaret, Frank and Velma, Margaret took me aside and told me that she thought Frank and Velma were very nice, but that she wanted to stay where she was. She indicated that she wished that they would "butt out and stay out of her life."

Evaluation of Margaret Moore: Margaret is a seventh grade student in Missoula. She is a good student. She is a thin, tall girl who appears her stated age. She has a bright, cheerful expression, is outgoing, warm and has a pleasing manner. She appears to have adequate intellectual func-

tioning, orientation, memory. She has a wonderful sense of humor and a genuine interest in people and her surroundings. Her verbal and motor behavior are normal. Her judgment and insight apppear to be intact. There are no psychotic symptoms. She appears to be deeply attached to the church that the Curtis family belongs to; and, deeply believes the teachings of that faith. Frank and Velma appear to have been respectful of Margaret's faith in this church; however, they do not agree with this or belong to it themselves. Margaret Moore appears to be a normal youngster for her age; and, I detect no psychiatric problems from my interview, at the present time.

I would like to close with a summary paragraph and recommendation to the Court. It appears to me, number one, that Frank Fitzgerald did have a serious illness of some sort as a young man. It is unclear to me whether this was a schizophrenic de-

pressive, or organic illness. My suspicion is that it was an organic illness. He has been left with some residual from this illness; but, it appears to me these residuals are not sufficient to prevent his daily functioning on a job for many years or his active marriage, at the present time. They are not sufficient to prevent adequate parenting, as shown on these visits. Velma Fitzgerald appears to be very decent, upstanding, hard working woman, who would certainly make an adequate parent for Margaret. Margaret Moore, despite the problems that she has had in the past, her schizophrenic mother, her having been in two foster homes, and including the benefit of her past, the psychiatric care, appears to me, at this time, to be a surprisingly well adjusted adolescent. I feel that Velma and Frank Fitzgerald have done an adequate and reasonable job in their visits with Margaret; and, would make suitable and adequate parents for Margaret

on a long term basis. I see no medical reasons that they could not perform adequately as parents. Margaret, herself, expresses a desire to continue in her present placement and indicates some wish that Frank and Velma would leave her alone. She expresses a desire for infrequent visitation. I would like to recommend to the Court that Velma and Frank are adequate parents for Margaret Moore. I can see no reason that Margaret could not be placed with them other than Margaret's desires that she not be placed with them. If Margaret is not placed with the Fitzgerald family, I would strongly recommend that Velma and Frank Fitzgerald be allowed some sort of continuing visitation rights and some sort of long term input into the life of their daughter and godchild, Margaret Moore.

If you have further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

(Sig) Van Dyk, M.D.

TWVD/mk

APPENDIX I-B (Typed Copy)

THOMAS W. VAN DYK, M.D.
Plaza West Professional Building
1537 Avenue D, #320
Billings, Mt. 59102
(406) 248-7299

July 15, 1980

Peggy Smith
Department of Public Welfare
Yellowstone County Courthouse
Billings, Mt. 59101

Mary Honaker
Mental Health Center
1245 North 29th
Billings, Mt. 59101

Dear Peggy and Mary,

I am writing to relay a psychiatric examination I did on Frank Fitzgerald that he approached me about privately and obtained in support of his petition for custody of Margaret Moore, his daughter by his report, from a common-law relationship with Jewel Moore eight years ago.

Apparently Margaret was in Jewel's custody for approximately the first seven years of her life, and was taken from her home one year ago and placed with the Phillips family here in Billings because

of child abuse allegations. Mr. Fitzgerald relates that he has maintained his interest in Margaret through this time although was prevented by various authorities, a doctor, an attorney and a public health nurse from speaking with or visiting Margaret. He on one occasion did request that Jewel let him send child support which he did not do.

His personal history includes that he is now a licensed technician who works on two-way radios. He was self employed up until the time Margaret was born, but the last eight years he has worked with Industrial Electronics servicing radios. He reports that he has six years of college education, that he has not been in trouble with the law and that he has not used drugs or alcohol. He has been seen once by a psychiatrist for depression which was a result of frustration in dealing with this problem with Margaret. He presently owns property in the community, two houses, one

of which he lives in and the other he rents. He is apparently engaged to a young woman, Connie, who has two daughters ages eight and nine and is also interested in the children.

Mr. Fitzgerald has made some contribution to society through his profession in that he has been president of the California Citizens Band Organization and has organized a publication on their behalf promulgating new rules for the citizens band radio system.

During my interview with him, Mr. Fitzgerald struck me as a straightforward, middle-aged male of 50 years who attempted to relate his story honestly and forthrightly. He was alert and oriented. His memory is good. I detected no major mood disorder and no major perceptual disorder. He seems to be a man of good moral character who has attempted to do well in his relationships with others and in his relations. I detected no defects in judgment

or insight. Verbal and motor behavior were normal.

Mr. Fitzgerald's family history gives some indication of psychiatric disorder in that his father shot himself ten years ago at the age of 62. His mother, age 67, is well and lives in Los Angeles. He has no brothers or sisters.

At the present time I feel he has no major psychiatric disorder, that he has maintained his interest in Margaret from a distance and attempted to maintain it personally through legal and medical channels over the years. He seems to have been a solid, hard-working citizen who has attempted to make his contribution to society. He has worked steadily and has not been involved in deviate behavior that I can tell. I would recommend that if no conflicting information turns up, Mr. Fitzgerald be given custody of his daughter by the court.

If you have any questions on this mat-

ter, please do not hesitate to contact me.

Sincerely,

(Sig) Van Dyk, M.D.

Psychiatrist

APPENDIX J (Typed Copy)

CONSTITUTION OF MONTANA

ARTICLE II
DECLARATION OF RIGHTS

Section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political

rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Section 5. Freedom of religion. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Section 10. Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Section 11. Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Section 15. Rights of persons not a-

dults. The rights of persons under 18 years of age shall include, but not be limited to, all fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

ARTICLE III
GENERAL GOVERNMENT

Section 1. Separation of powers. The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

UNITED STATES CONSTITUTION

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions , the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

AMENDMENT 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT 14

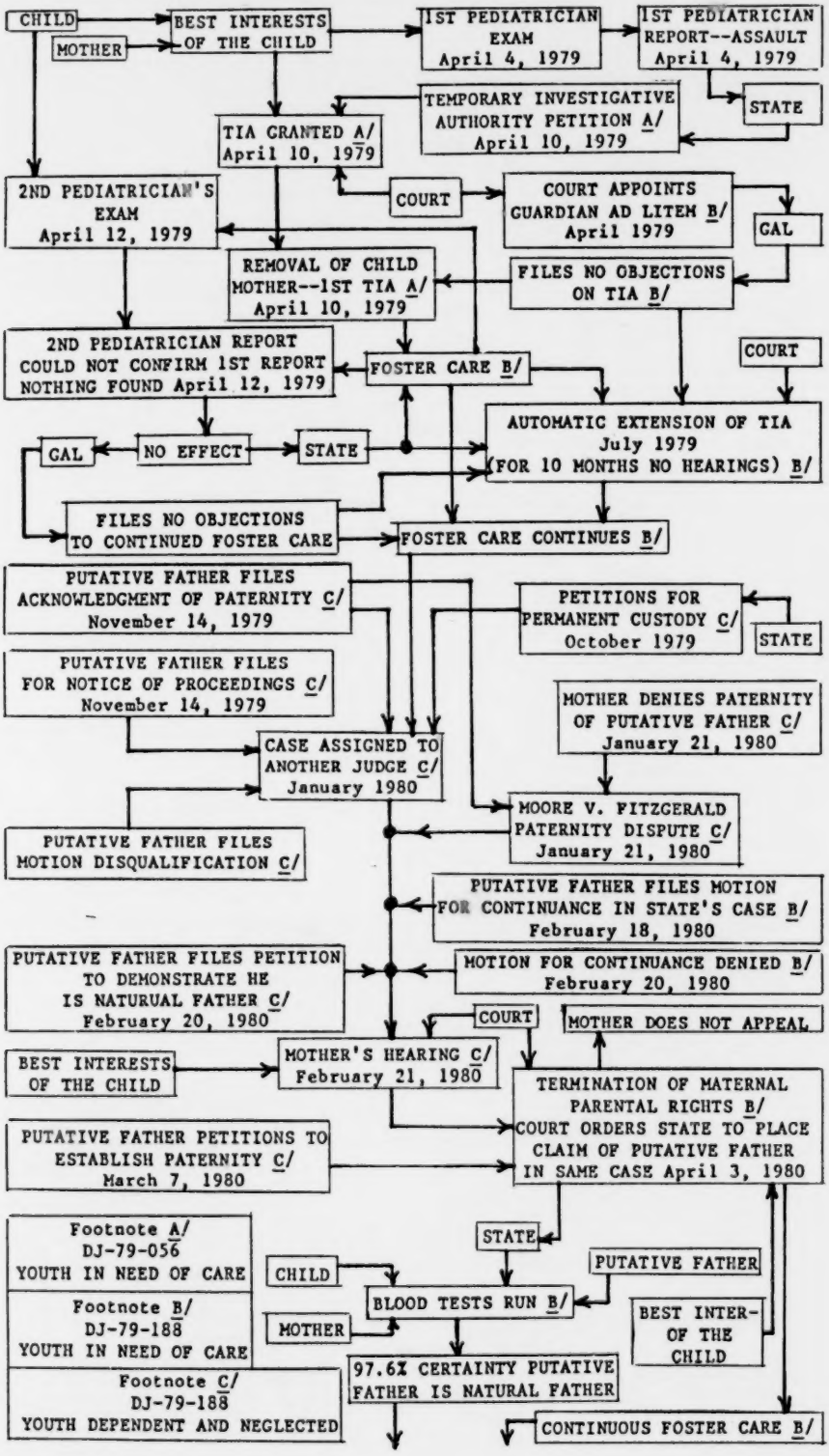
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

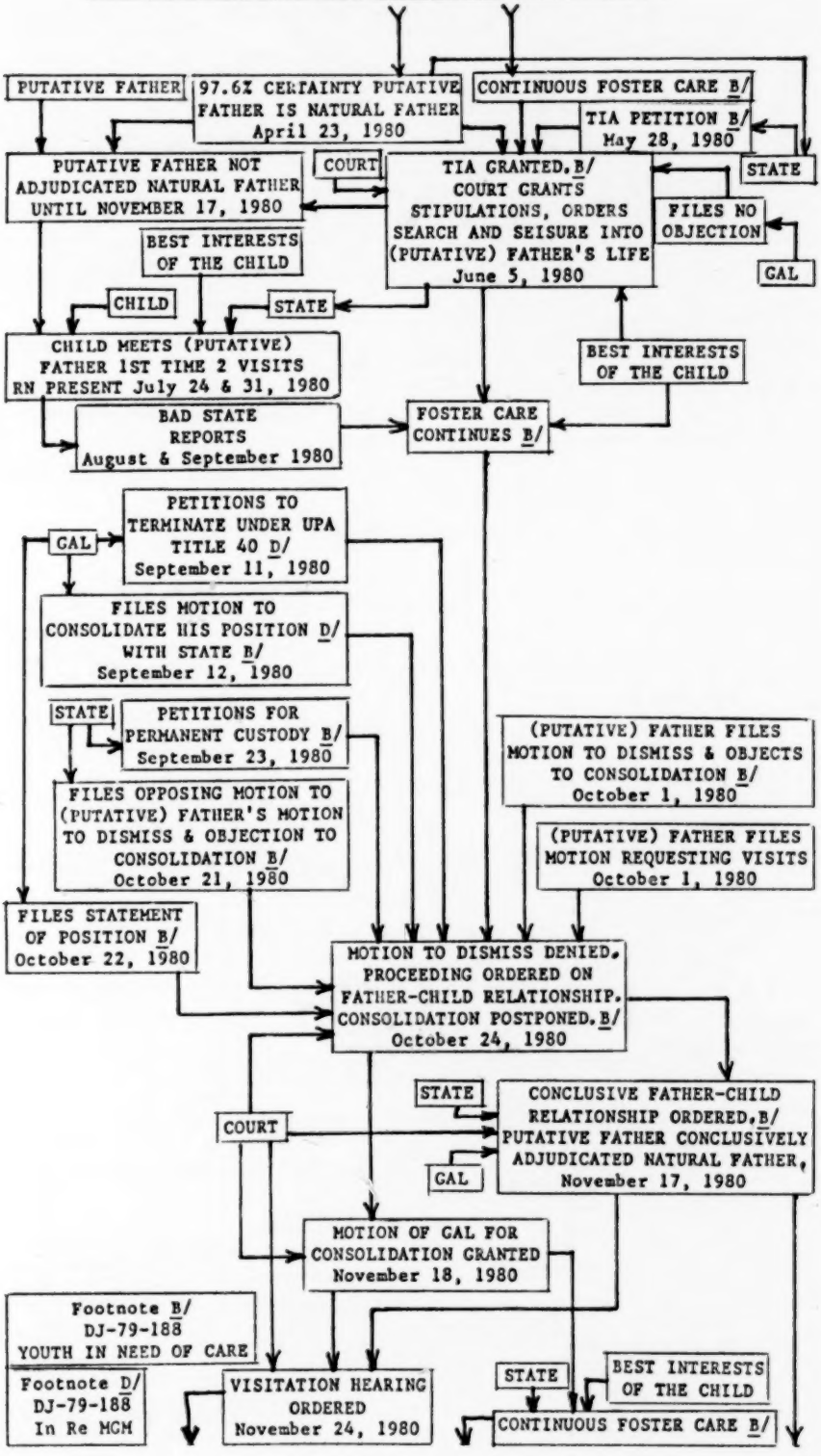
ARTICLE I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

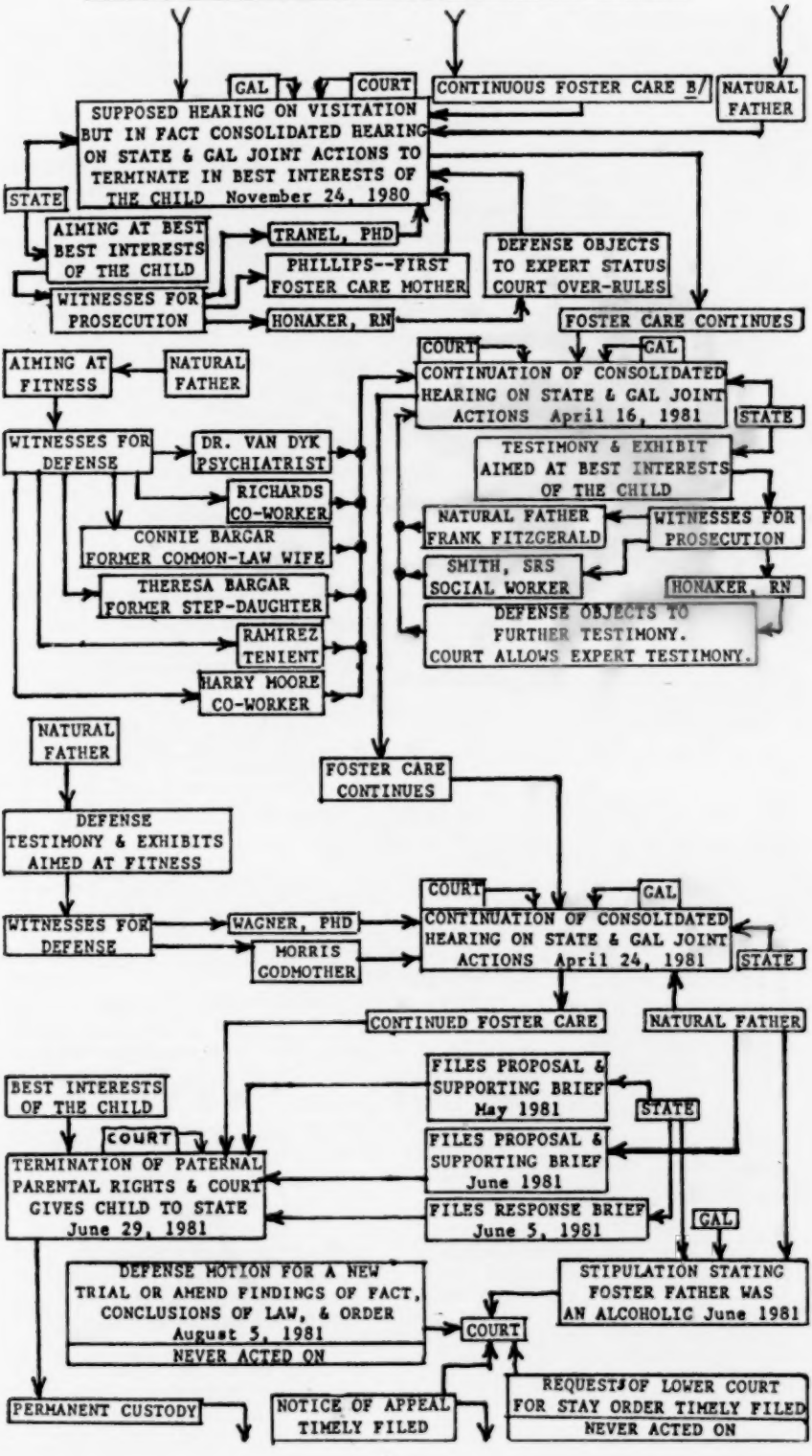
FLOW CHART
1ST STAGE--APRIL 1979 TO APRIL 1980



FLOW CHART
2ND STAGE--APRIL 1980 TO NOV 24,1980

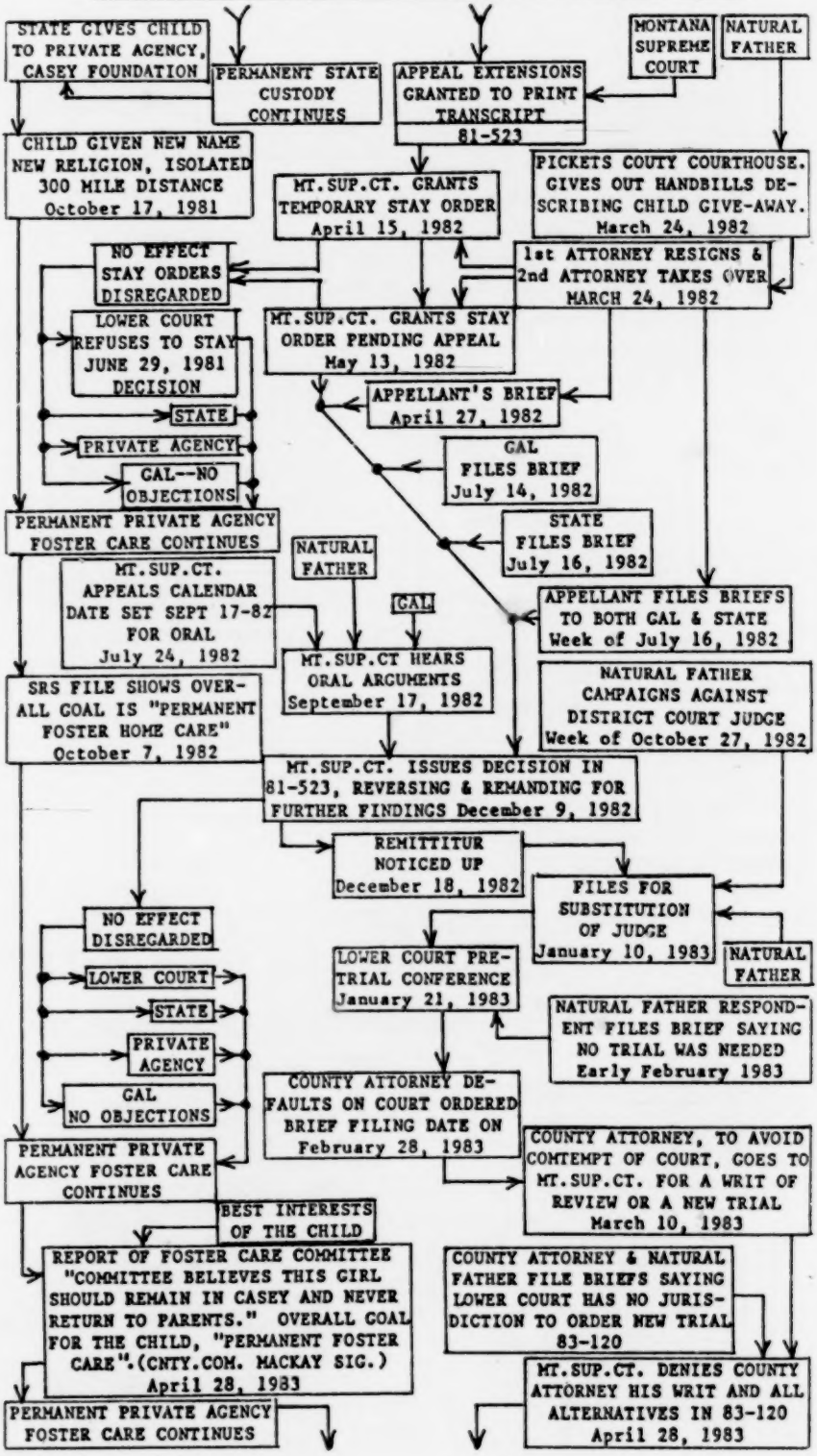


FLOW CHART
3RD STAGE NOV 24, 1980 TO OCT 17, 1981



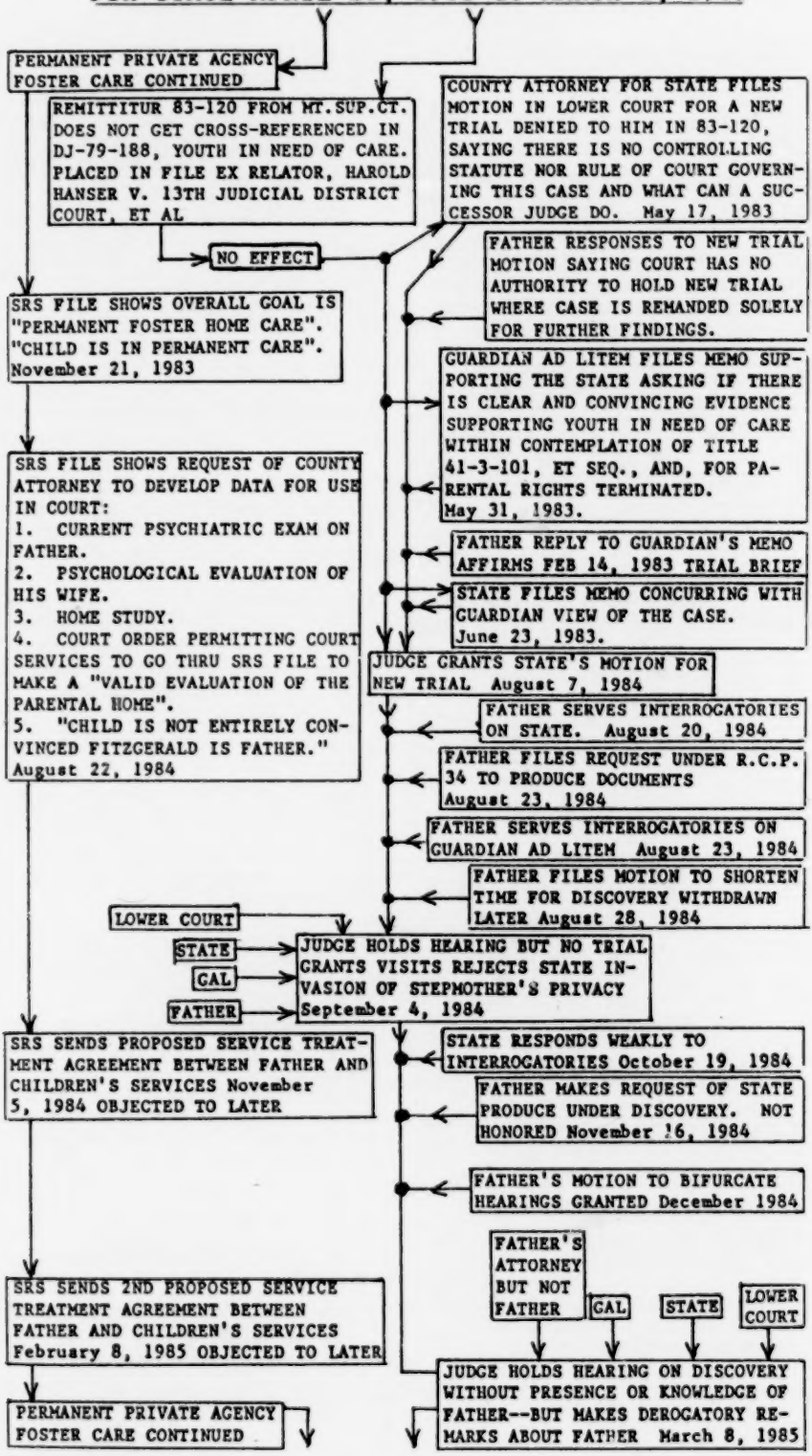
FLOW CHART

4TH STAGE OCT 17, 1981 TO APRIL 28, 1983

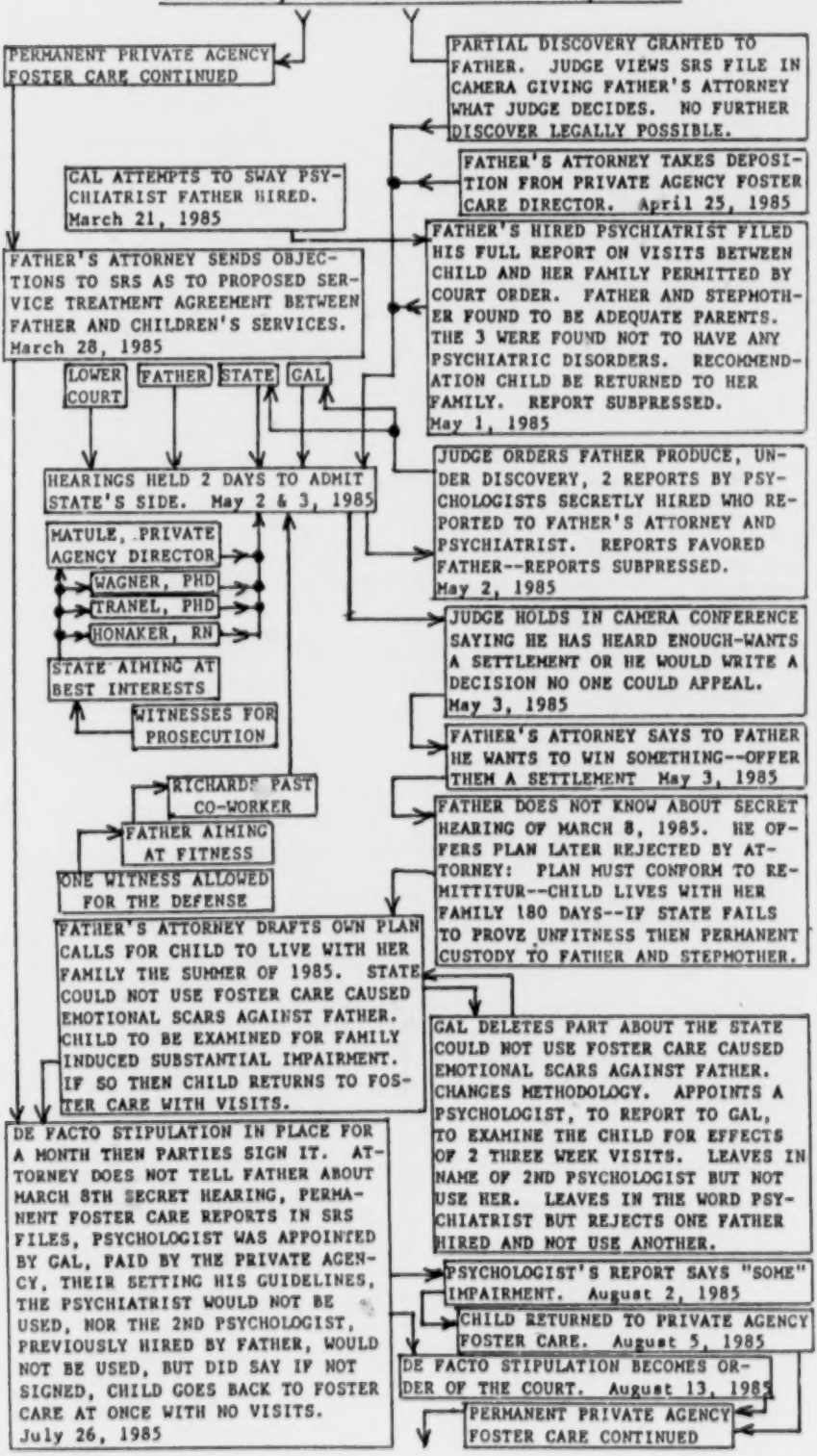


FLOW CHART

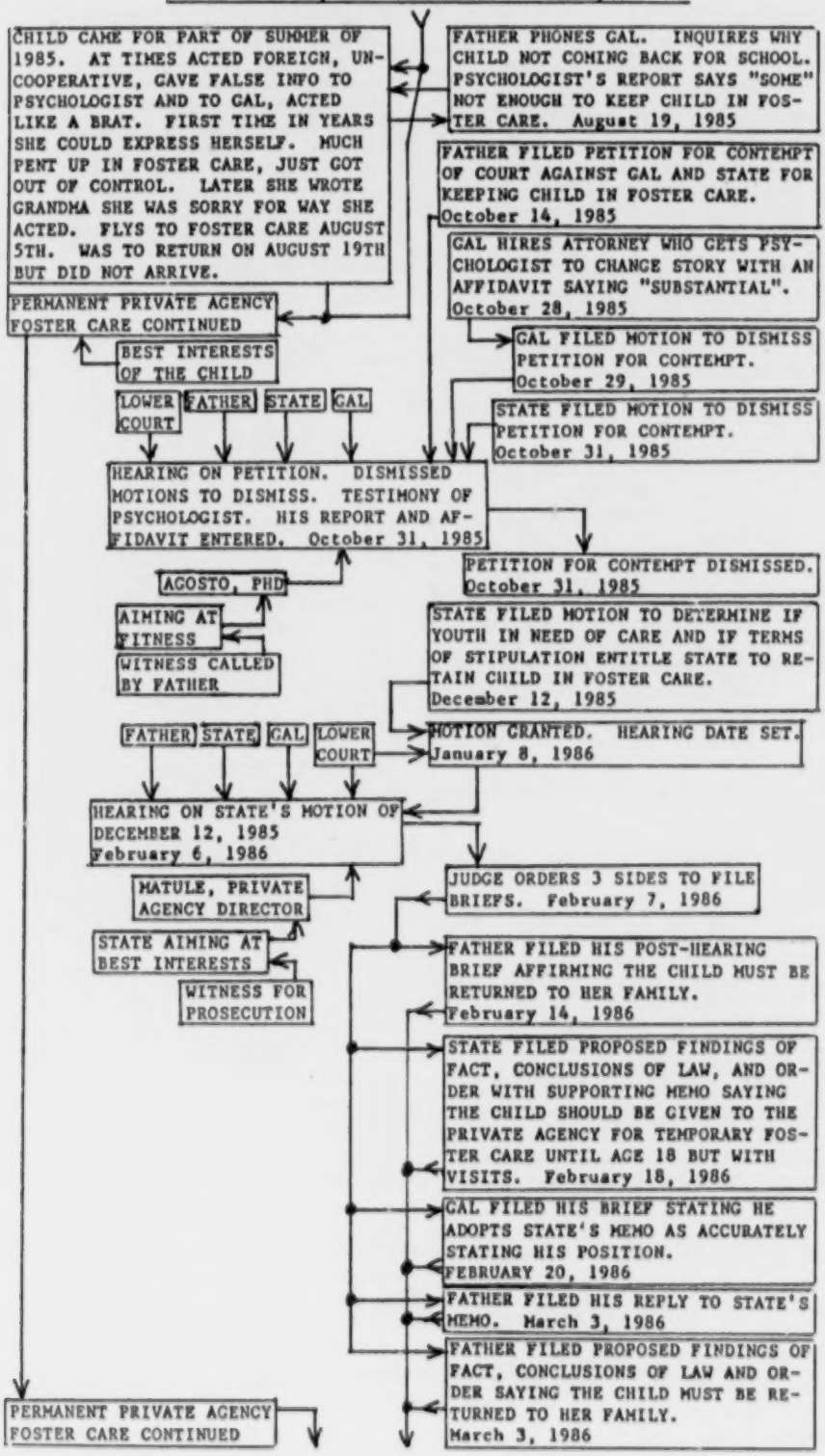
5TH STAGE APRIL 28, 1983 TO MARCH 8, 1985



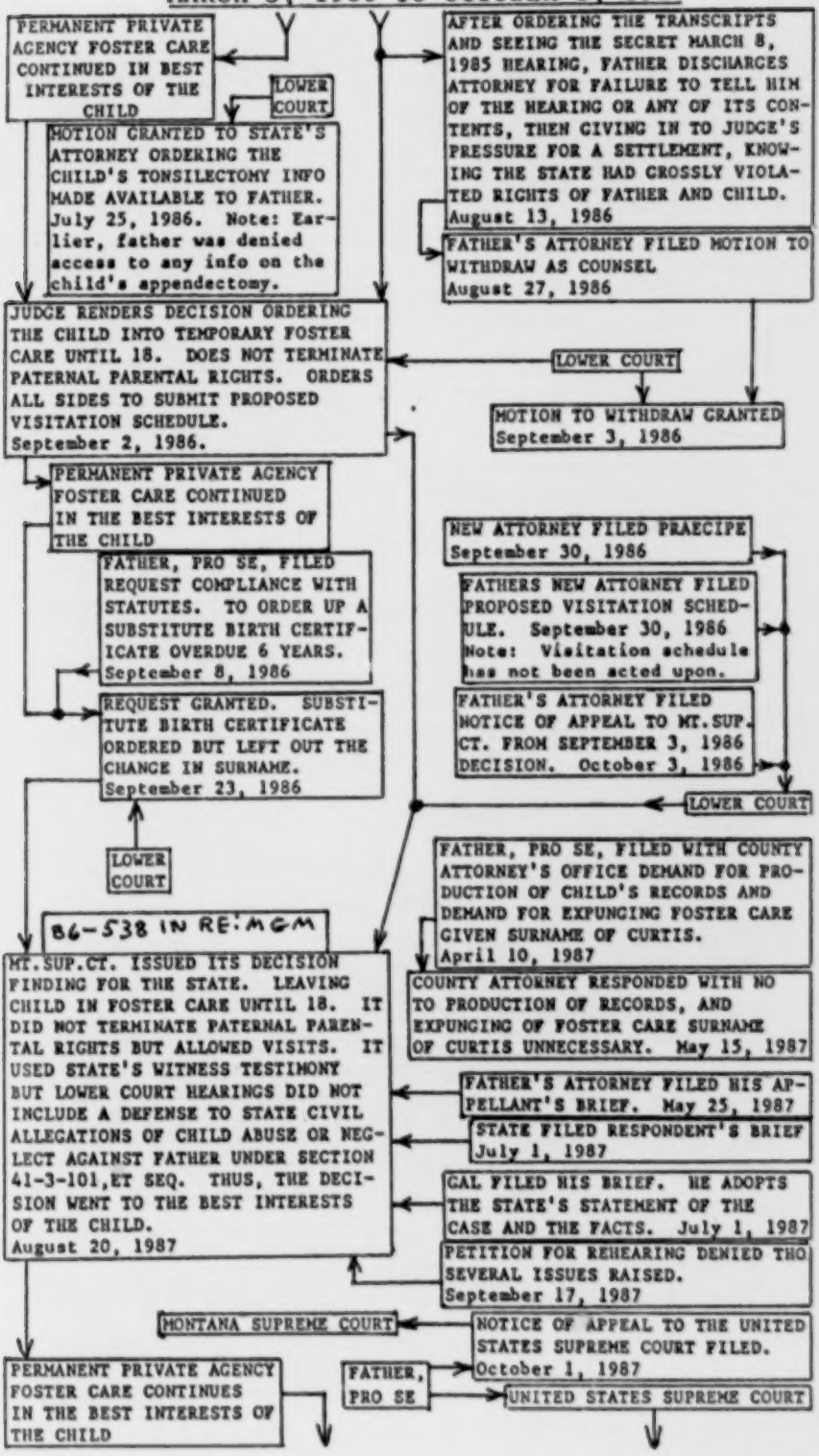
FLOW CHART 6TH STAGE
MARCH 8, 1985 TO AUGUST 13, 1985



FLOW CHART 7TH STAGE
AUGUST 13, 1985 TO MARCH 3, 1986



FLOW CHART 8TH STAGE
MARCH 3, 1986 TO OCTOBER 1, 1987



APPENDIX L

MCA TITLE 40, CHAPTER 6, PART 1
PARENT AND CHILD
FAMILY LAW

40-6-109. Jurisdiction--venue. (1) The district court has jurisdiction of an action brought under this part. The action may be joined with an action for dissolution, annulment, separate maintenance, support, or adoption.

(2) For purposes of an action brought under this part, personal jurisdiction is established in the courts of this state over any person who has had sexual intercourse in this state which has resulted in the birth of a child who is the subject of such proceedings. In addition to any other method provided by rule or statute, personal jurisdiction may be acquired by service in accordance with Rule 4B of the Montana Rules of Civil Procedure.

(3) The action may be brought in the county in which the child or the alleged father resides or is found or, if the fa-

ther is deceased, in which proceedings for probate of his estate have been or could be commenced.

40-6-112. Blood tests. (1) The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood tests. The tests shall be performed by an expert qualified as an examiner of blood types, appointed by the court.

(2) The court, upon reasonable request by a part, shall order that independent tests be performed by other experts qualified as examiners of blood types.

(3) In all cases the court shall determine the number and qualifications of the experts.

40-6-128. Proceeding to determine father's identity and terminate rights. (1) If a child is born out of wedlock and the mother executes or proposes to execute a

release terminating her rights to the child or if the child otherwise becomes the subject of an adoption proceeding, the agency or person to whom the child has been or is to be relinquished or the mother or person having custody of the child shall file a petition in the district court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by the court. The court shall hold a hearing as soon as practical to determine the identity of the father and to determine or terminate the rights of the father as provided in this section and in 40-6-129 and 40-6-130. This section is not applicable if the father is a person whose consent to adoption is not required under 40-8-111.

(2) Proof of service of a notice of intent to release or the putative father's verified acknowledgment of notice of intent to release shall be filed with the

court, if such notice was given to the putative father. The court shall request the records and statistics bureau of the department of health and environmental sciences to send to the court a copy of any notice of intent to claim paternity of the particular child which the bureau has received.

(3) If the mother has failed to name a putative father or has failed to file a notice of intent to release, the court shall cause inquiry to be made of the mother in an effort to identify the natural father. The inquiry shall include the following:

(a) whether the mother was married at the time of conception of the child or at any time thereafter;

(b) whether the mother was cohabiting with a man at the time of conception or birth of the child;

(c) whether the mother has received support payments or promises of support

payments with respect to the child or in connection with her pregnancy; or

(d) whether any man had formally or informally acknowledged or declared his possible paternity of the child.

(4) Notwithstanding this section or any other provisions of law and in consideration of her right to privacy, no mother of a child who is the subject of proceedings under this part may be compelled to testify concerning or to divulge the identity of the father or possible father of that child.

(5) Notice of the hearing shall be served upon the following persons in the manner appropriate under the Montana Rules of Civil Procedures or any manner which the court shall direct:

(a) a putative father who has timely filed a notice of intent to claim paternity as provided in 40-6-126 or 40-6-127;

(b) a putative father who has not been served a notice of intent to release at

least 30 days before the expected date of delivery specified in the notice of intent to release;

(c) any other male who was not served pursuant to 40-6-127(2) with a notice of intent to release and who the court, after inquiry of the mother or any other appropriate person, has reason to believe may be the father of the child.

(6) The notice of hearing shall inform the putative father that his failure to appear at the hearing constitutes a denial of his interest in custody of the child, which denial will result in the court's termination of his rights to the child.

(7) Proof of service of the notice of hearing required by subsection (5) shall be filed with the court. A verified acknowlegment of service by the party to be served is proof of personal service. Notice of hearing need not be required if the putative father is present at the hearing. A waiver of notice of hearing by

a person entitled to receive it is sufficient. If no person has been identified as the natural fathter or possible father, the court, on the basis of all information available, shall determine whether publication or public posting of notice of the proceeding is likely to lead to identification and if so shall order publication or public posting at the times and places and in the manner it considers appropriate. The name of the natural mother may be included in such publication only with her written consent.

(8) At the hearing, the court shall receive evidence as to the identity of the father of the child. Based upon the evidence received and the court's inquiry, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined.

(9) If the court finds that the father of the child is a person who did not re-

ceive either a timely notice of intent to release pursuant to 40-6-127 or a notice required pursuant to subsection (5) of this section and who has not waived his right to notice of hearing and is not present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing.

40-6-130. Best interests of the child--custody to father--legitimation. (1) If the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the father's parental rights should be given recognition in view of his effort or lack of effort to make provision for the mother while she was pregnant and for the child upon birth and whether the best interests of the child will be served by granting custody to him or to the agency of the

state of Montana, licensed adoption agency, or person to whom the mother has released or proposed to release custody of the child. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the mother of the child has released the custody of the child to an agency of the state of Montana, a licensed adoption agency, or a person, the agency or person shall be a proper party to petition the court for custody of the child.

(3) If the parental rights of the mother are terminated pursuant to this part or other law and if the court awards custody of the child out of wedlock to the putative father, the court shall enter an order granting custody to the putative father and legitimating the child for all purposes.

MCA TITLE 41, CHAPTER 3, PART 1
MINORS
CHILD ABUSE, NEGLECT, AND DEPENDENCY

41-3-101. Declaration of policy. (1) It is hereby declared to be the policy of the state of Montana to:

(a) insure that all youth are afforded an adequate physical and emotional environment to promote normal development;

(b) compel in proper cases the parent or guardian of a youth to perform the moral and legal duty owed to the youth;

(c) achieve these purposes in a family environment whenever possible; and

(d) preserve the unity and welfare of the family whenever possible.

(2) It is the policy of this state to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those reponsible for their care and protection. It is intended that the mandatory reporting of such cases by professional people and other community

members to the appropriate authority will cause the protective services of the state to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life wherever appropriate.

41-3-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Child" or "youth" means any person under 18 years of age.

(2) An "abused or neglected child" means a child whose normal physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.

(3) "Harm to a child's health or welfare" means the harm that occurs whenever the parent or other person responsible for the child's welfare:

(a) inflicts or allows to be inflicted upon the child physical or mental injury,

including injuries sustained as a result of excessive corporal punishment;

b) commits or allows to be committed a sexual assault against the child or exploits the child or allows the child to be exploited for sexual purposes or commits or allows to be committed the act of sexual abuse of children as defined in subsection 1) of 45-5-625;

(c) causes failure to thrive or otherwise fails to supply the child with adequate food or fails to supply clothing, shelter, education, or health care, though financially able to do so or offered financial or other reasonable means to do so;

(d) abandons the child by leaving him under circumstances that make reasonable the belief that the parent or other person does not intend to resume care of the child in the future or by willfully surrendering physical custody for a period of 6 months and during that period does not

manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child; or

(e) is unknown and has been unknown for a period of 90 days and reasonable efforts to identify and locate the parents have failed.

(4) "Adequate health care" means any medical or nonmedical remedial health care, including the prevention of the withholding of medically indicated treatment or medically indicated psychological care permitted or authorized under state law.

(5) "Withholding of medically indicated treatment" means the failure to respond to an infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) that, in the treating physician's or physicians' reasonable medical judgment, will

be most likely to be effective in ameliorating or correcting all such conditions. However, the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's or physicians' reasonable medical judgment:

(a) the infant is chronically and irreversibly comatose;

(b) the provision of such treatment would:

(i) merely prolong dying;

(ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

iii) otherwise be futile in terms of the survival of the infant; or

c) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane. For purposes of this subsection,

"infant" means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously hopitalized since birth. who was born extremely prematurely, or who has a long-term disability. The reference to less than 1 year of age may not be construed to imply that treatment should be changed or discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available under state laws regarding medical neglect of children over 1 year of age.

(6) "Threatened harm" means imminent risk of harm.

(7) "A person responsible for a child's welfare" means the child's parent, guardian, or foster parent; an employee of a public or private residential institution, facility, home, or agency; or any other person legally responsible for the child's welfare in a residential setting.

(8) "Physical injury" means death,

permanent or temporary disfigurement, or impairment of any bodily organ or function.

(9) "Mental injury" means an identifiable and substantial impairment of the child's intellectual or psychological functioning.

(10) "Dependent youth" means a youth:

(a) who is abandoned;

(b) who is without parents or guardian or not under the care and supervision of a suitable adult;

(c) who has no proper guidance to provide for his necessary physical, moral, and emotional well-being;

(d) who is destitute;

(e) who is dependent upon the public for support; or

(f) whose parent or parents have voluntarily relinquished custody of the child and whose legal custody has been transferred to a licensed agency.

(11) "Youth in need of care" means a

youth who is dependent, abused or neglected as defined in this section.

(12) "Department" means the department of family services provided for in 2-15-2401.

(13) "Limited emancipation" means a status conferred on a dependent youth by a court after a dispositional hearing in accordance with 41-3-406 under which the youth is entitled to exercise some but not all of the rights and responsibilities of a person who is 18 years of age or older.

(14) "Social worker" means an employee of the department of family services whose duties generally involve the provision of either child or adult protective services, or both.

41-3-103. Jurisdiction and venue. (1) In all matters arising under this chapter, the youth court shall have concurrent jurisdiction with the district court over:

(a) all youths who are within the state

of Montana for any purpose;

(b) any youth or other person subject to this chapter who under a temporary or permanent order of the court has voluntarily or involuntarily removed himself from the state or the jurisdiction of the court; or

(c) any person who is alleged to have abused, neglected, or caused the dependency of a youth who is in the state of Montana for any purpose.

(2) Venue shall be determined pursuant to 41-5-204.

41-3-401. Abuse, neglect, and dependency petitions. (1) The county attorney, attorney general, or an attorney hired by the county welfare department or office of human services shall be responsible for filing all petitions alleging abuse, neglect, or dependency. The county attorney or attorney general, or an attorney hired by the county welfare department or office

of human services with the written consent of the county attorney or attorney general, may require all state, county, and municipal agencies, including law enforcement agencies, to conduct such investigations and furnish such reports as may be necessary. Investigations as to financial status may not be made prior to the adjudicatory hearing provided for in 41-3-404.

(2) Upon receipt of a petition, the court shall set a date for an adjudicatory hearing on the petition. Such petitions shall be given preference by the court in setting hearing dates.

(3) A petition alleging abuse, neglect, or dependency is a civil action brought in the name of the state of Montana. The rules of civil procedure shall apply except as herein modified. Proceedings under a petition are not a bar to criminal prosecution.

(4) The parents or parent, guardian, or other person or agency having legal custo-

dy of the youth named in the petition, if residing in the state, shall be served personally with a copy of the petition and summons at least 5 days prior to the date set for hearing. If such person or agency cannot be served personally, the person or agency may be served by publication in the manner provided by the Montana Rules of Civil Procedure for other types of proceedings.

(5) In the event personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall appoint an attorney to represent the unavailable party where in the opinion of the court the interests of justice require.

(6) If a parent of the child is a minor, notice shall be given to the minor parent's parents or guardian, and if there is no guardian the court shall appoint one.

(7) Any person interested in any cause

under this chapter has the right to appear.

(8) Except where the proceeding is instituted or commenced at the request of the department of family services, a citation shall be issued and served upon a representative of the department prior to the court hearing.

(9) The petition shall:

(a) state the nature of the alleged abuse, neglect, or dependency;

(b) state the full name, age, and address of the youth and the name and address of his parents or guardian or person having legal custody of the youth;

(c) state the names, addresses, and relationship to the youth of all persons who are necessary parties to the action.

(10) The petition may ask for the following relief:

(a) temporary investigative authority and protective services;

(b) temporary custody;

(c) termination of the parent-child legal relationship and permanent legal custody with the right to consent to adoption;

(d) any combination of the above or such relief as may be required for the best interest of the youth.

(11) The petition may be modified for different relief at any time within the discretion of the court.

(12) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party.

41-3-402. Petition for temporary investigative authority and protective services. (1) In cases where it appears that a youth is abused or neglected or is in danger of being abused or neglected, the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services may file a petition for temporary investiga-

tive authority and protective services.

(2) A petition for temporary investigative authority and protective services shall state the specific authority requested and the facts establishing probable cause that a youth is abused or neglected or is in danger of being abused or neglected.

(3) The petition for temporary investigative authority and protective services shall be supported by an affidavit signed by the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services or a department of family services report stating in detail the facts upon which the request is based.

41-3-403. Order for immediate protection of youth. (1) (a) Upon the filing of a petition for temporary investigative authority and protective services, the court may issue an order granting such

relief as may be required for the immediate protection of the youth.

(b) The order, along with the petition and supporting documents, shall be served by a peace officer or a representative of the department of family services on the person or persons named therein. When the youth is placed in a medical facility or protective facility, the department shall notify the parents or parent, guardian, or other person having legal custody of the youth, at the time the placement is made or as soon thereafter as possible.

(c) The order shall require the person served to comply immediately with the terms thereof or to appear before the court issuing the order on the date specified and show cause why he has not complied with the order. The show cause hearing must be conducted within 20 days of the issuance of the order by the judge or a master appointed by the judge. The person filing the petition has the burden of pre-

senting evidence establishing probable cause for the issuance of the order. Except as otherwise provided herein, the rules of civil procedure shall apply.

(d) Upon a failure to comply or show cause the court may hold the person in contempt or place temporary legal custody of the youth with the department of family services until further order.

(2) The court may grant the following kinds of relief:

(a) right of entry by a peace officer or department of family services worker;

(b) medical and psychological evaluation of youth or parents, guardians, or person having legal custody;

(c) require the youth, parents, guardians, or person having legal custody to receive counseling services;

(d) place the youth in temporary medical facility or facility for protection of the youth;

(e) require the parents, guardian, or

other person having custody to furnish such services as the court may designate;

(f) such other temporary disposition as may be required in the best interests of the youth.

41-3-404. Adjudicatory hearing--temporary disposition. (1) In the adjudicatory hearing on a petition under 41-3-401, the court shall determine whether the youth is a youth in need of care and ascertain, as far as possible, the cause.

(2) The court shall hear evidence regarding the residence of the youth, the whereabouts of the parents, guardian, or nearest adult relative, and any other matters the court considers relevant in determining the status of the youth.

(3) In all civil and criminal proceedings relating to abuse, neglect, or dependency, none of the privileges related to the examination or treatment of the child and granted in Title 26, chapter 1,

part 8, except the attorney-client privilege granted by 26-1-803, apply.

(4)(a) If the court determines that the youth is not an abused, neglected, or dependent child, the petition shall be dismissed and any order made pursuant to 41-3-403 shall be vacated.

(b) If the court determines that the youth is an abused, neglected, or dependent child, the court shall set a date for a dispositional hearing to be conducted within 30 days and order any necessary or required investigations. The court may issue a temporary dispositional order pending the dispositional hearing. The temporary dispositional order may provide for any of the forms of relief listed in 41-3-403(2).

41-3-406. Dispositional hearing. If a youth is found to be abused, neglected, or dependent under 41-3-404, the court after the dispositional hearing may enter its

judgment making any of the following dispositions to protect the welfare of the youth:

(1) permit the youth to remain with his parents or guardian subject to those conditions and limitations the court may prescribe;

(2) grant an order of limited emancipation to a youth who is 16 years of age or older as provided in 41-3-408;

(3) transfer legal custody to any of the following:

(a) department of family services;

(b) a child-placing agency willing and able to assume responsibility for the education, care, and maintenance of the youth and which is licensed or otherwise authorized by law to receive and provide care of the youth; or

(c) a relative or other individual who, after study by a social service agency designated by the court, is found by the court to be qualified to receive and care

for the youth;

(4) order any party to the action to do what is necesary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling.

(5) order such further care and treatment as the court may deem in the best interest of the youth.

41-3-408. Limited emancipation. (1) The court, after the dispositional hearing provided for in 41-3-406, may, upon request of a youth who is 16 years of age or older, enter an order granting limited emancipation to the youth.

(2) Limited emancipation may be granted only if the court has found:

(a) that limited emancipation is in the youth's best interests;

(b) that the youth desires limited emancipation;

(c) that there exists no public inter-

est compelling denial of limited emancipation;

(d) that the youth has, or will reasonably obtain, money sufficient to pay for financial obligations incurred as a result of limited emancipation;

(e) that the youth, as shown by prior conduct and preparation, understands and may be expected to responsibly exercise those rights and responsibilities incurred as a result of limited emancipation;

(f) that the youth has graduated or will continue to diligently pursue graduation from high school, unless circumstances clearly compel deferral of education; and

(g) that the youth will undergo peridic counseling with an appropriate advisor.

(3) An order of limited emancipation must specifically set forth the rights and responsibilities that are being conferred upon the youth. These may include but are not limited to one or more of the follow-

ing:

(a) the right to live independently of in-house supervision;

(b) the right to live in housing of the youth's choice;

(c) the right to directly receive and expend money to which the youth is entitled and to conduct his own financial affairs;

(d) the right to enter into contractual agreements and incur debts;

(e) the right to obtain access to medical treatment and records upon the youth's own authorization; and

(f) the right to obtain a license to operate equipment or perform a service.

(4) An order of limited emancipation must include a provision requiring that the youth make periodic reports to the court upon terms prescribed by the court.

(5) If no order for contribution is made under 41-3-1124 and the court determines that a youth to whom limited emanci-

pation is granted does not have sufficient funds to finance transition to limited emancipation status, the court may order the department to provide such funds, not to exceed $500, directly to the youth. The youth shall account to the court for the disposition of such funds and shall repay all such money to the department within 1 year of the order of limited emancipation unless the court for cause orders an extension.

(6) The court, on its own motion or on the motion of any parties to the dispositional hearing, may modify or revoke the order upon a showing that:

(a) the youth has committed a material violation of the law;

(b) the youth is failing to diligently pursue graduation from high school;

(c) the youth has violated a condition of the limited emancipation order;

(d) the best interests of the youth are no longer served by limited emancipation;

or

(e) the youth has discontinued periodic counseling with approved advisors.

(7) The department shall mail a copy of this part to all high school counseling offices.

41-3-601. Short title. This part may be cited as the "Parent-Child Legal Relationship Termination Act of 1981."

41-3-602. Purpose. This part provides procedures and criteria by which the parent-child legal relationship may be terminated by a court if the relationship is not in the best interest of the child. The termination of the parent-child legal relationship provided for in this part is to be used in those situations where there is a determination that a child is abused, neglected, or dependent, as defined in 41-3-102.

41-3-603. Definitions. As used in this part, unless the context otherwise requires, the following definitions apply:

(1) "Guardian ad litem" means a person appointed to represent a child who is the subject of a petition for the termination of the parent-child relationship.

(2) "Youth in need of care" means a youth who is dependent, abused, or neglected as defined in 41-3-102.

(3) "Parent-child relationship" means the legal relationship that exists between a child and his birth or adoptive parents as provided in Title 40, chapter 6, part 2, unless that relationship has been terminated by competent judicial decree as provided in this part or in 40-6-135 or in 40-6-234.

(4) "Treatment plan" means a written agreement between the department or court and the parents that includes action that must be taken to resolve the condition or

conduct of the parents that resulted in the need for protective services for the child. The treatment plan may involve other parties, if necessary, for protective services.

41-3-607. Petition for termination--separate hearing--right to counsel--no jury trial. (1) The termination of a parent-child legal relationship shall be considered only after the filing of a petition pursuant to 41-3-401 alleging the factual grounds for termination. Termination of a parent-child legal relationship shall be considered at a dispositional hearing held pursuant to 41-3-406, following or together with an adjudicatory hearing held pursuant to 41-3-404, within 180 days after the filing of the petition.

(2) After the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services files a petition for termi-

nation of a parent-child relationship pursuant to this part, parents shall be advised of the right to counsel, and counsel shall be appointed in accordance with 41-3-401(12).

(3) A guardian ad litem shall be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent-child legal relationship. The guardian ad litem shall continue to represent the child until the child is returned home or placed in an appropriate permanent placement. If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any counsel requested by the parent.

(4) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship.

41-3-609. Criteria for termination. (1)

The court may order a termination of the parent-child relationship upon a finding that the circumstances contained in subsection (1)(a), (1)(b), (1)(c), as follows exist:

(a) The parents have relinquished the child pursuant to 40-6-135;

(b) the child has been abandoned by his parents as set forth in 41-3-102(3)(d); or

(c) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court must enter a finding that continuation of

the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condidtion of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making such determinations, the court shall consider but is not limited to the following:

(a) emotional illness, mental illness, or mental deficiency of the parent of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) a single incident of life-threatening or gravely disabling injury to or disfigurement of the child caused by the parent;

(d) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care

and provide for the child;

(e) present judically ordered long-term confinement of the parent;

(f) the injury or death of a sibling due to proven parental abuse or neglect; and

(g) any reasonable efforts by protective service agencies that have been unable to rehabilitate the parent.

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child. The court shall review and, if necessary, order an evaluation of the child's or the parent's physical, mental, and emotional conditions.

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

(a) two medical doctors submit testimony that the parent is so severely men-

tally ill that such person cannot assume the role of parent;

(b) the parent is incarcerated for more than 1 year and such treatment plan is not practical considering the incarceration; or

(c) the death of a sibling caused by abuse or neglect by the parent has occurred.

41-3-610. Review following termination. (1) At the conclusion of a hearing in which the court orders termination of the parent-child legal relationship, the court shall order that a review hearing be held within 180 days following the date of the termination to determine if the child has been permanently placed.

(2) At the review hearing, the agency or individual vested with the custody of the child shall report to the court whether the plan for permanent placement of the child has been accomplished. If the child

is not in a permanent placement at the time of the review hearing, the guardian ad litem shall submit to the court a written report with recommendations, based upon an independent investigation, for disposition meeting the best interests of the child.

41-3-1115. Foster care review committee. (1) In every judicial district the youth court judge, in consultation with the department, shall appoint a foster care review committee. The members of the committee must be willing to act without compensation. The committee shall be composed of not less than five or more than seven members. The members shall include:

(a) a representative of the department;

(b) a representative of the youth court;

(c) someone knowledgeable in the needs of children in foster care placements who is not employed by the department or the

youth court;

(d) a representative of a local school district;

(e) if the child whose care under review is an Indian, someone, preferably and Indian person, knowledgeable about Indian cultural and family matters who is appointed effective only for and during that review; and

(f) if there is one, the foster parent of the child whose care is under review. The foster parent's appointment is effective only for and during that review.

(2) When a child is in foster care under the supervision of the department or if payment for care is made pursuant to 41-3-1122, the committee shall conduct a review of the foster care status of the child. The review must be conducted within a time limit established by the department. The time limit must comply with federal law and may not be later than the 12 month anniversary date of the child's

placement into foster care.

(3) The department shall provide the committee with guidelines for operation of the committee. Within 30 days of the foster care review, the committee shall provide the youth court and the department a written report of its findings and recommendations for further action by the youth court or the department.

(4) The department shall adopt rules necessary to carry out purposes of this section.

(5) Because of the individual privacy involved, meetings of the committee, reports of the committee, and information on individuals' cases shared by committee members is confidential and subject to the confidentiality requirements of the department.

(6) The committee is subject to the call of the youth court judge to meet and confer with him on all matters pertaining to the foster care of a child before the

youth court.

(The above MCA cites were a Typed Copy)

(Typed Copy)

USC TITLE 25--INDIANS

1912. Pending court proceedings

(e) Foster care placement orders; evidence; determination of damage to child

No Foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the ab-

sence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

APPENDIX M

[redacted]

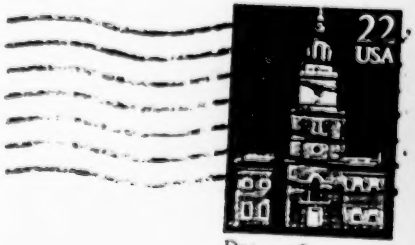
PRINTED IN U.S.A. PO 999 REV. 11-89

ITINERARY FOR: CURTIS/MARGARET MC INVOICE NBR: 71103401 PAGE 01
TICKET NBR: 005 1413093883 USD90.00

DATE	AIRLINE	FL/CL	FROM	LEAVE	TO	ARRIVE
28DEC MO	CONTINENTAL	1638 Y	MISSOULA	330P	BILLINGS	428P
2JAN SA	CONTINENTAL	1751 Y	BILLINGS	210P	MISSOULA	311P

THE CASEY FAMILY PROGRAM
800 NORTH BENTON
HELENA, MONTANA 59601

HELENA, MT 596
PM
8 DEC
1987



Dec 12,1787
Pennsylvania

Frank B. Fitzgerald
3000 Hallowell Lane
Billings, MT 59101

193

APPENDIX N (Typed Copy)

IN THE SUPREME COURT OF THE STATE OF MONTANA

1987

IN THE MATTER OF M.G.M.) NOTICE OF
Youth in Need of Care) APPEAL

NOTICE IS HEREBY GIVEN that Frank B. Fitzgerald, the Appellant in the above entitled action does hereby appeal to the Supreme Court Of The United States Of America from the judgment made and rendered in this matter on August 20, 1987 and made final by denial of Petition For Rehearing on September 17, 1987, and from each and every part thereof.

Signed and Dated the First DAY OF OCTOBER, 1987.

(Sig) Frank B. Fitzgerald

****

CERTIFICATE OF SERVICE

This is to certify that the foregoing "NOTICE OF APPEAL" was duly served via

first class prepaid mail upon all opposing attorneys of record at their addresses this First DAY OF OCTOBER, 1987.

(Sig) Frank B. Fitzgerald

Subscribed and sworn this First DAY OF OCTOBER, 1987,

(SEAL) (Sig) Linda Branum
Notary Public for State of Montana Residing at Billings,Mt.
My Commission Expires 8/18/88

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1582

In The

Supreme Court of the United States

October Term, 1987

FRANK BORING FITZGERALD,
Appellant,

v.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS

MICHAEL T. GREELY
Attorney General

*CLAY R. SMITH
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

RANDI M. HOOD
Special Assistant Attorney General
State of Montana
48 North Last Chance Gulch
Helena, Montana 59601
(406) 444-5900

Attorneys for Appellees

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982)	6
Matter of M.G.M., 201 Mont. 400, 654 P.2d 994 (1982)	3, 4
Matter of M.G.M., — Mont. —, 741 P.2d 770 (1987)	5
Parker v. McLain, 237 U.S. 469 (1915)	5
Picard v. Connor, 404 U.S. 270 (1971)	5

STATUTES

28 U.S.C. § 1257(2)	2, 4
28 U.S.C. § 2254(b)	2, 5

No. 87-1582

In The

Supreme Court of the United States

October Term, 1987

FRANK BORING FITZGERALD,

Appellant,

v.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS

Pursuant to Rule 16.1 of the Rules of this Court, the Appellees, State of Montana, Department of Family Services, Eugene Huntington, Director, move that the appeal from the judgment of the Supreme Court of Montana be dismissed.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 741 P.2d 770. The opinion of the Supreme Court of Montana in a previous appeal is reported at 201 Mont. 400, 654 P.2d 994.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on August 20, 1987 and a motion for rehearing was denied September 17, 1987. The notice of appeal to this Court was filed October 1, 1987. App. 194-195. The corrected jurisdictional statement was served April 12, 1988. The jurisdiction of this Court is alternatively invoked as an appeal under 28 U.S.C. § 1257(2); as a petition for writ of certiorari under 28 U.S.C. § 2103(1) and as a petition for writ of habeas corpus under 28 U.S.C. § 2254(a).

———o———

STATEMENT OF THE CASE

M.G.M., the child who is the subject of this case, was born out of wedlock on June 10, 1972 and resided with only her mother until 1979. At that time, the Department of Social and Rehabilitation Services (SRS)[1] instituted dependency and neglect proceedings under section 41-3-401, MCA which, in 1980, resulted in termination of the mother's parental rights. During the pendency of the termination proceedings, appellant filed a notice of paternity and unsuccessfully attempted to intervene in the termination proceedings. Subsequent to the termination of the mother's rights, SRS filed a petition for temporary investigative authority and later, a dependency and neglect proceeding against appellant. These proceedings were consolidated with a paternity action filed under sections

---

[1]In 1987, the child welfare responsibilities of SRS were legislatively transferred to the Department of Family Services.

40-6-107 to 116, MCA by the child's guardian ad litem. The district court declared appellant the natural father of M.G.M. The court then held a series of hearings resulting in a determination based on the psychiatric and psychological evaluations of appellant and other evidence that it would be in the best interest of M.G.M. to grant her custody to SRS and terminate appellant's parental rights. App. 66-77.

Appellant appealed the order of the district court to the Montana Supreme Court. *In the Matter of M.G.M.*, 201 Mont. 400 (1982). The Montana Supreme Court reversed the judgment and remanded for further findings. The reversal was based on the district court's failure to determine whether M.G.M. was abused, dependent or neglected as defined in statute before proceeding to the best interest standard.

During the pendency of the matter on remand, the appellant, the state and the guardian ad litem agreed by stipulation to placing M.G.M. in appellant's physical custody for six weeks during the summer of 1985. App. 48-55. The placement was to be monitored by psychologist Richard Agosto. If M.G.M. suffered or was likely to suffer any substantial impairment of her psychological or intellectual functioning, she was to return permanently to the custody of SRS. In fact, Dr. Agosto did find such substantial impairment and SRS petitioned the court to find M.G.M. a youth in need of care. On September 2, 1986, the district court found M.G.M. to be a youth in need of care, continued her custody with SRS and allowed appellant regular visitation. App. 28-47. Appellant appealed to the Montana Supreme Court. On August 20,

1987, the Montana Supreme Court affirmed the district court decision and appellant now appeals to this Court.

———o———

ARGUMENT

1. Appellant seeks to have this Court invoke jurisdiction of the case as an appeal under 28 U.S.C. § 1257(2). In the alternative, appellant seeks to have his action treated as a writ of certiorari. The facts of the case and the opinions of the Montana Supreme Court do not evidence any challenge by appellant as to the validity of a statute on federal grounds or federal question.

In the original appeal to the Montana Supreme Court, the issues raised by appellant were stated by the court as:

> (1) Whether the District Court erred by applying the "best interests of the child" test in section 40-6-130(1), MCA, instead of the "abuse and neglect" standards in sections 41-3-401, MCA, et seq.?
>
> (2) Whether there is clear and convincing evidence to support either the "best interests of the child" test or the "abuse and neglect" test?
>
> (3) Whether psychiatric nurse, Mary Honaker, was qualified to give an expert opinion and diagnosis of appellant's mental health?

Matter of M.G.M., 201 Mont. 400, 405, 654 P.2d 994, 997 (1982); App. 78-91. At this juncture, appellant raised only factual matters and the applicability of state law. No federal question was raised. No federal constitutional or statutory challenge was made to the state statutes.

2. Appellant's second appeal to the Montana Supreme Court is equally devoid of an issue cognizable by this Court. Appellant raised only one issue: "Are the District Court's findings of fact and conclusions of law supported by clear and convincing evidence." *In the Matter of M.G.M.*, — Mont. —, 741 P.2d 770, 772 (1987) App. 1-12. Clearly this issue deals solely with factual matters presented in the case. This Court has consistently articulated the burden on appellants to properly structure issues in the lower courts in order to invoke the jurisdiction of this Court. In *Parker v. McLain*, 237 U.S. 469 (1915), this Court said:

> Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specifically set up or claimed in that court and derived by its decision. (Citation omitted)

Id. at 471. Appellant has failed to claim any federal right in the state courts and the decision of the state court was not based upon a federal right. Appellant cannot now raise a federal question to invoke jurisdiction on appeal in this Court.

3. If all else fails, Appellant seeks to have this case treated as an application for a writ of habeas corpus under 28 U.S.C. § 2254(b). Appellant, however, does not have standing to apply for the writ. He is not seeking to have himself released from custody. Neither is he the guardian of M.G.M., the one he does seek to have released. Additionally, appellant must have presented the state court with the opportunity to rule on any federal issues upon which he bases his application for writ of habeas corpus. *Picard v. Connor*, 404 U.S. 270 (1971). As pre-

viously discussed, appellant has raised no federal issues in the state courts, nor shown that no state remedies are available to him. *Batchelor v. Cupp,* 693 F.2d 859, 962 (9th Cir. 1982).

———o———

CONCLUSION

For the reasons explained above, this case does not present any federal question presented and ruled upon in the Montana Supreme Court. The Montana Supreme Court decisions dealt only with the application of state statutes and factual questions. Further Appellant does not have standing to apply for a writ of habeas corpus. The appeal or petition for writ of certiorari or application for writ of habeas corpus should be dismissed.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General

CLAY R. SMITH
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

RANDI M. HOOD
Special Assistant Attorney General
State of Montana
48 North Last Chance Gulch
Helena, Montana 59601
(406) 444-5900

Attorneys for Appellees

Dated: May 1988

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1582

In the Supreme Court
OF THE
United States

October Term 1987

FRANK BORING FITZGERALD,
Appellant,

V.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

BRIEF OPPOSING MOTION TO DISMISS

FRANK BORING FITZGERALD,
3000 Hallowell Lane
Billings, Mt 59101
406-259-5866
Appellant, Pro Se

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT 10

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Stanley v. Illinois, 405 US 645 (1972)..15

Green v. Campbell, 35 W.Va. 698,
14 S.E. 212 19

Ex Parte Chin King, 35 F 354 (1892) 19

LOWER COURT CASES

DJ-79-188, In Re MGM 1,6

81-523 Mt.Sup.Ct., In Re MGM, 654 P2 994
(1982) 1,3,6,11,12,13,14

83-120 Mt.Sup.Ct., ex rel Hanser v. 13th
District Court, comes from
In Re MGM, DJ-79-188 1,6,14,15

86-538 Mt.Sup.Ct., In Re MGM, 741 P2 770
(1986) 1,10

US STATUTES

USC TITLE 42-601 ET SEQ. 7

FEDERAL STATUTES VIOLATED 11-12

STATE STATUTES

40-6-107 TO 116, MCA 2

40-6-128, MCA 3,4

40-6-130, MCA 2,3

TITLE 40 2,13,16

TITLE 41 2,13,16

UNIFORM PARENTAGE ACT 2

LAW BOOKS

Hurd, Hab. Corp. 450 19

Bouvier's Law Dict. 1, 1406 (1914) 19

MISC.

FEDERAL QUESTION 6,7,11,15

CONSTITUTIONAL QUESTION...6,12,13,14,15,19

WRIT OF HABEAS CORPUS 17,18,19,20

PARENTAL RIGHT 2,3,4,7,11,14,17

CONSTITUTIONAL RIGHT 3,10,12,13,14,18

FEDERAL RIGHT 14

APPELLANT'S

RIGHT 2,3,4,7,10,13,14,16,17,18

No. 87-1582

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Frank Boring Fitzgerald, Appellant
v.
State of Montana; Department of Family Services, Eugene Huntington, Director, Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OPPOSING MOTION TO DISMISS

Pursuant to Rule 16.5, of this Court, Appellant, Frank Boring Fitzgerald, files his Brief Opposing Motion To Dismiss.

OPINIONS BELOW

Vital to this case on Appeal are 3 decisions of the Mt.Sup.Ct., based on 9 years of DJ-79-188: 81-523, App. 78-91; 83-120, App.96-97; and 86-538, App. 1-12. Appellees correctly identified two, 81-523, and 86-538, in Appellees' MOTION TO DISMISS. Failed to mention was Mt.Sup.-Ct.'s decision in Ex. Rel. Harold Hanser v. 13th Judicial Court, et al., 83-120, App. 96-97.

JURISDICTION

Appellees concur with Jurisdiction in Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Conspicuously absent are matters of considerable importance to this case left out of Appellees' Statement Of The Case.

For a concise overview of this 9 year case, see App. 139-146. Appellees erred on P2-3 stating 40-6-107 to 116, MCA was the paternity action filed by Guardian:

> "On September 11, 1980, the guardian ad litem for the child filed a petition to determine paternity and to determine whether appellant's parental rights should be terminated under the provisions of the Uniform Parentage Act specifically section 40-6-130, MCA." App. 81. (emp add)

Appellees, P3, left out, "consolidation" of Guardian's Title 40 Parental Rights termination and the State's Title 41 Parental Rights termination petitions were objected to by Appellant:

> "Over objections by appellant, the District Court consolidated the proceedings brought by the guardian and the SRS." App. 81. (emp add)

It needs to be emphasized, those objections Mt.Sup.Ct. 81-523 mentioned were based upon motioned and briefed infringement and violation of Appellant's Constitutional Rights clear back in October 1980 and June 1981.

Appellees erred, P3, in stating reversal was based on...failure to determine whether MGM was abused...before proceeding to the best interest standard.

Vital to this case is the fact the reversal, 81-523, was based upon a number of items and which reversal, of Right, should have accomplished a number of things:

> "The District Court then concluded as a matter of law that it would be in MGM's best interest to place her in the custody of SRS..." App. 84.
>
> "...that appellant's parental rights be terminated." App. 84-85.
>
> "Appellant claims that sections 40-6-128 and 40-6-130, MCA, should not have been applied to him, and that District Court therefore erred..." App. 85.
>
> "Respondents claim that when the mother's rights were terminated, the child became subject to a 'potential adoptive proceeding'". App. 87.

"...section 40-6-128, MCA, did not give the guardian of the child the right to petition for termination of the appellant's parental rights." App. 87.

"...District Court erred by consolidating the guardian's petition with that of SRS." App. 87-88.

"It is well-established that absent findings of abuse or neglect based upon clear and convincing evidence, parental rights may not be terminated...These constitutionally protected parental interests in the child are not weakened by the fact that a child is born out of wedlock..." App. 88. (emp. add.)

"Further, this Court has held that a finding of abuse, neglect, or dependency' is the jurisdictional prerequisite for any court ordered transfer of custody.' Only after a showing of dependency, abuse, or neglect, is the 'best interests of the child' test the appropriate basis for determining custody." (emp. not add.)

"Therefore, the District Court here was obligated to find that the child was a 'youth in need of care' and abused or neglected in order to deprive appellant of custody and terminate his rights..." App. 88-89.

"During appellate argument, the guardian for the child admitted that the District Court had not made any findings that the child was abused or neglected by appellant. The findings only determined the child's best interests. More importantly, these findings do not provide a sufficient basis on which to conclude that the child would be in danger of 'imminent risk of harm'

> if she lived with or visited with appellant." App. 90.
>
> "...nothing in this record suggests that the nurse has had the training, experience, or education to diagnose schizophrenia." App. 91.

Reversal did not accomplish reversal. It caused no difference in the attitude of SRS and company towards returning the child to Appellant who had not abused or neglected her. Thus Appellant was deprived of a reversal in practice. That deprivation is a constitutional issue if ever there were one.

Lack of reversal allowed the State time and opportunity to manufacture historical developments detrimental to the parent-child relationship. (EVIDENCE OF STATE'S ABILITY IN THIS CASE TO MANUFACTURE HISTORICAL DEVELOPMENTS DETRIMENTAL TO THE PARENT-CHILD RELATIONSHIP HAS RECENTLY TURNED UP in the form of Department of Family Services, file on sexual assault upon MGM, App. 196-249., and a letter written by MGM thereafter, App. 250-255.)

The reversal, 81-523, did not order the lower court to hold a new trial nor to grant State's motion for a new trial.

In fact, the opposite became true 4 months later in 83-120. The State, in the person of Yellowstone County Harold Hanser, was denied all he had asked for, in the 83-120 denial. 83-120 directly concerned Appellant, the conduct of DJ-79-188, the State, and trial court as regards a new trial. Facts this Court ought to weigh heavily towards a review; there are significant federal and constitutional questions raised in this appeal.

Missing from Appellees' MOTION TO DISMISS, is the fact, the lower court's conduct, at that moment of 83-120 denial, was determined by both 83-120 and 81-523 decisions. Missing is the fact the State, Guardian, and the court disregarded both. A year-and-a-half later the court granted the year-and-a-half old State's Motion For A New Trial. Questions about those e-

vents, which masked Appellant's Rights, are federal questions: Questions of speedy trial, due process, Parental Rights interference by the State, Child conditioning at the hands of the State detrimental to the parent-child relationship, and others.

As to the so-called "Stipulation", App. 48-55, referred to at P3, signed as an order of the court after the fact, App. 55, it was signed under duress by Appellant; the child would have been returned immediately to foster-care. We would have had no more time with her. Appellant, altho represented by counsel, did not make a fully informed decision. We had no idea MGM was a foster-care abused and neglected child bringing effects of abuse to bear and interact with us. Nor was there ever offered nor put into place a "Service Treatment Plan" to reunite our family, required by USC Title 42-601 et seq., which might have given some credence to

the Stipulation.

Instead, the Stipulation was used as an investigatory tool by the State. Had Appellant known what was going on both on the record and off, he would not have signed:

The judge, in a hearing not told about to Appellant, as much as called Appellant a criminal for wanting to go public with the case (Appellant believing the State's actions against his child amounted to a kind of conspiracy to establish a precedent for the removal forever of children from their real families simply in the best interests of the children; a Nazi-style doctrine);

The media was very anxious to learn more about the case. Appellant had picketed the courthouse earlier drawing attention of TV and the public to a very serious question of morality and law (Appellant handed out "Handbills" describing the illegalities in the case. He also drew

the attention of every member of both state houses and the governor);

In the Stipulation, the 6 weeks Appellees mention, P3, were two 3 week visits (spaced by 2 weeks back to foster-care for more conditioning to reject us as her parents); 6 week physical custody to Appellant was not court ordered until later, therefore they were in fact only visits;

It permitted invasion of our privacy without court order;

It permitted Casey to hire the psychologist on their own terms;

It was a Casey guideline, any impairment at the hands of State and foster-care could not be used in the analysis, except, impairment due to foster-care was to be attributed to us, as it was.

The so-called monitoring, it turned out, was used for invasion of our privacy and to report Nazi-style to the Guardian anything discovered which fit the criteria established by Casey guidelines.

Left out of Appellees' Statement of the Case was judge's demand for a settlement, only after hearing the State's side giving no opportunity for defense. Procedural due process of law was violated at many points up to that moment in time as shown in Appellant's Jurisdictional Statement.

ARGUMENT

Appeal 86-538 was one sided. The trial record, absent a defense, formed the basis of deciding there was clear and convincing evidence. Appellant's Constitutional Right to procedural due process at trial was suppressed yet a detrimental decision was based on a defective record.

This 9 year case must be seen in its entirety so as to see from the beginning, where and why the case went wrongly. Right or wrong, process has been extensive.

Appellant claims proper issue structure and correct procedural due process was lacking at many points and compounded

errors. To see but a few quick glances via State's presentation, does not get at the truth.

This appeal is based upon many federal questions:

For example, federal statutes were violated by the State and courts to arrive at the present situation where the State 'looks good", that is, the State was able to manufacture historical developments all along detrimental to the parent-child relationship thru violative movement and control of the child's religion, name, location distance, and no scheduled visitation all the while the reversal, 81-523, was in place;

No speedy trials;

Failure to put into place in the first place recognized Parental Rights absent State interference;

Requiring praying to the State for visitation, which requirement suppressed Parental Rights absent first a finding of

unfitness, because application for visitation allegedly involved the best interests of the child used as a State excuse in the absence of unfitness of the parent;

Constitutional Rights are reserved in the people until correct due process exercises a State right to modify or suppress those people rights. Great harm was done to the parent-child relationship, absent the necessary finding of parental unfitness which unfitness can only be arrived at via correct procedural due process;

The child, in foster-care for 11 of her 18 years which constitutes cruel and unusual punishment for which the child has committed no crime, is a crimeless victim;

Before reversal 81-523, constitutionality questions were raised by Appellant. Reversal left intact those questions thereafter never acted upon.

Because 81-523 was decided on more than the 3 issues initially raised by Appellant, 81-523 must be looked at beyond the

mere 3 issues alone. For example, Issue 1 was decided on several sub-issues, all of which stressed errors on the part of the State, Guardian, and the court.

It is long been practice, if error suppresses Constitutional Rights of appellants, the errors and the suppression are constitutional questions.

Consolidation of petitions, of Guardian, who had no standing, using Title 40 to terminate, and of the State also seeking termination using Title 41, was error and suppression of Appellant's Constitutional Right to a fair trial, assuming one were jurisdictionally proper in view of misapplication of Title 40 jurisdiction. See Jur.St. P21-22 ftnte 2. Those made it a constitutional question of due process.

Errors and suppressing of Appellant's Constitutional Rights are not mere factual matters and the applicability of state law. To suggest otherwise is color of law. Following 81-523, that is in fact

how the State, the Guardian, and the court treated the case and continued on as if there were no successful appeal.

The reversal did not materialize in a fair trial, if one were legal in view of 83-120, again a constitutional question of due process.

It is argued, Parental Rights terminated without correct due process violates an existing US Constitutional Right to due process. US Constitutional Rights were granted to all and are federal rights. The State recognized Appellant's Parental Rights early on, then terminated them but used incorrect due process in arriving at its decision which was reversed in 81-523.

It was the burden upon the State and court to properly structure issues raised AND PROCEDURES used in lower court. Failing to do so permitted misapplication of law burdening Appellant into the required successful appeal, 81-523.

But after 81-523, the State again

failed, saying in effect, it could not structure the issues raised AND PROCEDURES correctly in lower court, necessitating 83-120. Via 83-120, the State and court should have been able to structure the issues raised AND PROCEDURES correctly, but it did not for a third time, then.

In Stanley v. Illinois 405 US 645 (1972) this Court reached down into the lower court for the federal and constitutional questions, alto criticized by the then minority for doing so, in order to reach a better understanding of the issues raised on certiorari. It was found, the State had not correctly structured their issues raised nor PROCEDURES, so as to assure constitutional process via a required trial of the first instance. Failure was the state law and its loose interpretation. So it is here.

Many other cases decided by this Court over the years have led to the conclusion, it is proper and only necessary to give

adequate examples of failure of the State and courts to correctly follow procedural due process in order to attract the attention of this Court.

This case stands in violation at many points, of the "law of the land" as interpreted by this Court.

Because of errors in properly structuring State's issues AND PROCEDURES, four times now, it should be obvious the State, the Guardian, and the courts have relied upon state statutes which are un-understandable, thereby vague. Why did the Guardian use Title 40 seeking to terminate Appellant's Rights? If not for vagueness of Title 40, MCA? And why did the State declare Appellant's child to be a youth in need of care directing its request for a TIA at no one? If not for vagueness of Title 41, MCA? Who is to right a wrong of vague statutes? The legislature? And in the meantime who is to suffer, as have both Appellant and child?

The fairness doctrine as well as significant consequential failures on the part of the State, the Guardian, and the courts to follow procedural and correct constitutional due process ought to weigh in favor of Appellant for review of his grievances against the State by this Court of those inequities, those injustices, those total grievances unresolvable at any other forum of this land. Think of 9 years of deprivation of one's only child's childhood and 9 years of her deprivation of her natural father's love and protection. Can it be attributed only to failure of mere writings on paper, the statutes? Or, to fallibility of papers, issues, courts, and adversarial procedures?

At Appellees' Argument 3, P5, as to Appellant's Alternative Count Two, the Writ of Habeas Corpus. Appellees state, on P5-6, Appellant does not have standing to apply for the writ.

Because Appellant's Parental Rights are

not terminated, he relies on Constitutional Rights not terminated by correct due process of law. Thus Appellant has "legal custodianship" tho not physical custody.

The State and its foster-care providers have admitted to child abuse and neglect caused by foster-care providers while she was in foster-care. See App. 98-108, the first foster-care provider mother's notarized statement; App. 256-277, the SRS file; App. 278-279, the Galen Stipulation of June 1981; App. 196-249, the DFS file.

That constitutes detention of the child by the State acting in bad faith over the past 9 year period. (Recently, a coverup in bad faith was completed. App. 280-282)

If a State remedy were available to Appellant and thought to be successful, surely it would have long since been used. With 3 attorneys on the case over these 9 years to advise, none wanted to use the Writ of Habeas Corpus because each believed it would not work, rather appeals

on errors and constitutional questions are the mode of the times.

As to application of a Writ of Habeas Corpus:

> "The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice; Green v. Campbell, 35 W. Va. 698, 14 S.E. 212...Ex parte Chin King, 35 F 354 (1892)...But in such cases, as the just object of the proceeding is rather to remove illegal restraint than to enforce specifically the claims of private custody...Hurd, Hab. Corp. 450" Quote in Bouvier's Law Dictionary Volume 1, 1406 (1914).

One form of the Writ of Habeas Corpus applicable in this case requiring standing only as a parent is, "You have my child which by Right belongs with me." "Give back to me my child which by Right belongs with me, or charge me with a crime."

(Appellant currently seeks a state Writ of Mandate. A Civil Rights action is planned in federal court against those involved in the coverup of the foster-care provider father's sexual assault and a

complaint will be filed with the US Attorney on violations of federal law.)

CONCLUSION

For the above reasons, Appellant has filed his BRIEF OPPOSING Appellees' MOTION TO DISMISS and prays this Honorable Court grants Appellant's Appeal, or in the Alternative Count One, Petition for a Writ of Certiorari, or, Count Two, Petition for a Writ of Habeas Corpus as presented in Appellant's Jurisdictional Statement modified hereby with new and significant matters herein which are material to this case.

Respectfully submitted,

Dated June 2, 1988 _____

Frank Boring Fitzgerald, Pro Se
3000 Hallowell Lane, Billings, Mt 59101
406-259-5866

(APPENDICES O,P,Q,R,S,T FOLLOW)

AFFIDAVIT

STATE OF MONTANA)

) SS.

County of Yellowstone)

FRANK BORING FITZGERALD, being first duly sworn, hereby deposes and says:

He has personally prepared and read his BRIEF OPPOSING MOTION TO DISMISS, in the Appeal 87-1582.

He certifies, in his judgment matters raised and opposition to MOTION TO DISMISS are well founded,

Frank Boring Fitzgerald

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 2nd day of June, 1988.

STACEY TROTTER NOTARY PUBLIC STATE OF MONTANA

Stacey Trotter

Notary Public in State of Montana

Residing in Billings, Montana

My Commission Expires 6/30/89

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) SS.
County of Yellowstone)

FRANK BORING FITZGERALD, being first duly sworn, hereby deposes and says:

He has personally served via prepaid first class mail, his BRIEF OPPOSING MOTION TO DISMISS, in the Appeal 87-1582 on the following persons known to be of interest in this APPEAL.

For Appellees:

HON. MICHAEL T. GREELY, Attorney General

*CLAY R. SMITH, Assistant Attorney General State of Montana, Justice Building, 215 North Sanders, Helena, MT 59620-1401 406-444-2026.

RANDI M. HOOD, Special Assistant Attorney General, State of Montana, 48 North Last Chance Gulch, Helena, Mt 59601 406-444-5900.

Damon L. Gannett, Guardian Ad Litem, 720 North 30th Street, Billings, Mt 59101-0097 406-245-6338.

Ralph L. Herriott, Former Counsel for Appellant, 315 North 24th Street, Billings, Mt 59101. 406-248-7110

* Counsel of Record

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 2nd day of June, 1988.

Notary Public in State of Montana
Residing in Billings, Montana
My Commission Expires 6/30/89

(APPENDICES O,P,Q,R,S,T FOLLOW)

APPENDICES O, P, Q, R, S, and T

O...DFS FILE.....App. 196-249

P...MGM LETTERS.....App. 250-255

Q...SRS FILE.....App. 256-277

R...GALEN STIP. JUNE 1981.....App. 278-279

S...GOVERNOR'S COVERUP LET....App. 280-281

T...CNTY. ATT. COVERUP LET.....App. 282

APPENDIX O (Typed Copy)

DEPARTMENT OF FAMILY SERVICES
STATE OF MONTANA, TED SCHWINDEN, GOVERNOR
406-444-3865
PO BOX 8005, HELENA, MONTANA 59604

February 25, 1988

Frank B. Fitzgerald
3000 Hallowell Lane
Billings, MT 59101

Dear Mr. Fitzgerald,

Please be advised that I interpreted your letter of January 28 to George Bulatowicz as a request for disclosure of our files on your daughter. I immediately contacted our Missoula office to prepare and copy the file relating to the incident involving Kenneth Curtis. I expect that information will be sent to you very shortly.

You need to know that we will release all information we generated that pertains

specifically to your child. We are not authorized to release any psychological, medical or other reports that are generated by other professionals. If any of those exist, they must be acquired from the professional himself.

I hope handling your letter in this way satisfies your concerns.

Sincerely,

Sig: Randi M. Hood

Legal Counsel

TH3/j

DEPARTMENT OF FAMILY SERVICES
STATE OF MONTANA, TED SCHWINDEN, GOVERNOR
406-444-3865
PO BOX 8005, HELENA, MONTANA 59604

February 29, 1988

Ralph Herriott
Attorney at Law
315 N. 24th
Billings, MT 59101

Dear Mr. Herriott:

Enclosed are copies of all materials produced by Department of Family Services regarding the Curtis/Moore case.

Sincerely,

Sig: Shirley V. Tiernan
Social Worker III

Arlene R. Grossman
Social Worker Supervisor II

SVT:hw
Enc.

CURTIS PROGRESS SUMMARY AND SERVICE PLAN REVIEW Narrative for each Summary and Review Activity and Progress Summary: Recording date_____ Dates, events, persons and resources involved, including problems encountered, and reasons.

12-22-87 Spoke to Arlene Grossman, Intervention Supervisor, regarding this case and how I should proceed. She suggested I speak to Russ Francetich.

Spoke to Russ Francetich at the District Office regarding the case. Russ stated that it would be up to Mimi to decide whether or not the child remained in the home. He will discuss case with Mimi.

Informed John Domitrovich at the District Office of this case.

Annebeth Felsman, S.W. III

12-29-87 Made report to City Police.

AF

12-31-87 Spoke to Mimi Morgan. She stated

that the decision to remove will be ours, not hers. She will provide extensive and intensive visitation to the family along with co-worker, Janet Finley. Mimi will also arrange counseling for Margaret with Joan Hess-Homeier and feels that she has a high level of trust between Margaret and herself. Ken Curtis saw Mike Scolatti on December 23rd, which was his first visit.

Called the City Police to see who is assigned to this case; spoke to Rusty Wickman. This is a county case--said to call Don Morman.

Sent referral to Don Morman, Missoula County Sheriff's Department.

AF

01-04-88 Talked to Russ Francetich. Said he felt the decision to remove would be both Mimi's and mine. I said I like either the father to leave during this evaluation period or Margaret. Russ stated he was concerned because the foster father, Ken, has been grooming Margaret and that

he is high school teacher.

Spoke to Dr. Scolatti regarding Ken Curtis. He felt that Margaret Moore would be safe in the home of Ken Curtis but felt that he should talk with Margaret and see how she feels since Ken still is an offender. He felt that his interview with Ken went well and that he was forthright.

01-06-88 Karen Emerson and I attempted to interview Margaret Moore Curtis at Sentinel but she was uncomfortable and we asked her to come into the office. Karen E. and I interviewed Margaret Moore Curtis at our office. This was taped at the request of Don Morman, Sheriff's Dept.

01-06-88 Margaret said she had an aversion to men and felt uncomfortable with them but didn't explain why. Said that Ken started to hug her only this year and it made her feel uncomfortable.

Said she wasn't especially close to either her mother, Marilyn or father, Ken, and that her mother was a distant person.

Margaret said the Curtis' were her second foster placement and that she had been to counseling before and she really liked Dr. Lear.

Karen Emerson and I attempted to interview Margaret Moore Curtis at Sentinel High School, but she was uncomfortable and we asked her to come into the office.

Karen Emerson and I interviewed Margaret Moore Curtis at our office. This interview was taped at the request of Don Morman of the County Sheriff's Dept.

Don Morman, Sheriff's Office said to tape the interview.

Interview Margaret Moore at our DFS Office, 301 W. Alder with Karen Emerson, S.W. The interview was taped.

Earlier, Karen and I contacted Margaret at Sentinel High School but she did not want to be interviewed there.

Margaret stated that her father, Ken Curtis, reported the sexual assault to Mimi Morgan of Casey Family in December

1987 and said he reported as "fondling". The incident occurred the day after Thanksgiving, which would have been November 27, 1987. Her father, Ken, was to get her up at 10:00 A.M. and she woke up on her own at 10:08 A.M. Her mother, Marilyn, had gone to work and her brother, Chad Curtis, was home on Christmas break from the U. of M. By the time Ken entered her room, Margaret stated that she was sitting up. She stated that she was wearing a pair of sweat pants, socks, tank top and a sweat shirt. Ken sat on her bed and began to talk about how he felt that Margaret was his "real" daughter and that an experience he had had two years ago when Margaret fell asleep on his shoulder confirmed his feelings. Margaret said she was very tired and Ken put his arm around her and pulled her back on the bed with him and then she had her neck on his arm. Ken asked Margaret if he could ask her a personal question. Ken then placed his

hand on her breasts (outside of clothing) and asked to see her breasts. Margaret became upset and told him to get out and he did. Later, when Margaret was putting her contacts on in the bathroom, Ken came to the door and kept apologizing for having asked her that question. Margaret said she was upset and called her friend, Debbie, and told her what happened. She had also wanted to tell her school counselor, Ms. Bilyle, but she was not available. Her friend, Debbie, encouraged her to do something, but nothing ever came of it. A couple of weeks after the incident, Margaret said she wanted to use the telephone and was in the garage. Ken became very upset--said Margaret treated him like a lover and that he didn't want to get into a relationship--sexual--and that's not what he meant. About Dec. 19, Margaret was going to mall with her mother, Marilyn. Margaret told her that Ken sexually abused her. Initially, Marilyn did

not believe her, then did. Marilyn went home and confronted Ken and he admitted. Ken later told Mimi and he said he was sorry and would go see Mike Scolatti.

Before the interview, Margaret was concerned about two things: 1) If her dad had to find out (Frank Fitzgerald), 2) what the police would do, and 3) foster care placement.

Annabeth M. Felsman, S.W. III

TIME LINE

November 24 -- Ken Curtis has corrective nose surgery by Dr. Hickman

November 27 -- Sexual assault occurs.

December 19 -- Margaret Moore discusses sexual assault with Marilyn Curtis, foster mother.

December 21 -- Curtis family discuss sexual assault with Mimi Morgan of Casey Family.

December 23 -- Ken Curtis first appointment with Dr. Mike Scolatti.

December 24, 1987 -- Great Falls with Curtis family.

December 28-Jan. 2, 1988 -- Billings with Frank Fitzgerald.

January 6, 1988 -- Interview of Margaret Moore by Annabeth Felsman and Karen Emerson.

January 7, 1988 -- Tape given to Don Morman, Sheriff's Office.

January 12 -- Spoke to Mrs. Marilyn Curtis regarding options and her discussing these (Margaret placed out of home or Ken leaving) with Ken.

Mrs. Curtis felt that this was not a very big incident and felt that this happened because 1)Ken had had nose surgery on November 24 and the drugs hampered his judgment, and 2) the administrative changes in Casey and there not providing a worker until August 1987.

January 13 -- Call from Mimi Morgan. Said that the Curtis' decided that Ken would move from the family home. Said Margaret

did not want to be contacted at school and what type of visitation would be approved.

AF

01-11-88 Wendell Frogan, Sheriff's Department called to inform me that he has completed his investigation of the Ken Curtis/ Margaret Moore case and it has been sent to the office of Dusty Deschamps. The objective is to keep him in treatment, not to prosecute.

AF

01-11-88 Spoke to Randi Hood, State Attorney for DFS, 444-3865. I informed her that Margaret Moore was in the temporary custody of the state until age 18 years, and wanted to know whether Margaret's natural father, Frank Fitzgerald, had the right to know about the sexual abuse. Randi said yes and that Casey Family had the responsibility to inform Mr. Fitzgerald because they were managing the case.

Annabeth Felsman, S.W. III

01-12-88 Spoke to Damon Gannett, attorney and Guardian ad litem for Margaret Moore 245-6338. He feels that the removal of Margaret Moore from Ken and Marilyn Curtis would be very difficult and his first choice would be to have Ken leave the family home and if this is not possible, then Margaret must leave. Also, he stated that the father, Frank Fitzgerald, has the right to know and someone would need to tell him.

Talked to Jan Watson, Receiving Home, 549-1072, in regard to Margaret. Mimi Morgan did contact her and Jan is willing to take Margaret on a trial basis.

Spoke to Marilyn Curtis. Told her there were two choices: 1)Ken leaves the home, or 2)Margaret leaves. Offhand, Marilyn said she would not allow her husband to leave. Marilyn felt this was a minor incident and due to tow things 1)lack of contact with Casey, and 2)drugs that Ken had taken prior to the incident. Ap

parently, on Tuesday, November 24, 1987, Ken had surgery on his nose and she feels this caused him to lack judgment and he was depressed. Dr. Hickman performed the surgery; Dr. Brinkley was the anesthesiologist. Marilyn stated that Wendell Frogan thought this was important information.

Spoke to Mike Scolatti, 728-4100, in regard to Ken Curtis. Mike has seen him once and felt that his treatment would be shorter than most offenders--between six months and one year because he felt Ken had a handle on the dynamics. Mike said he would not put his neck out for Ken but felt that the two, Ken and Margaret, could reside in the same home as long as Ken was in group and Margaret in therapy. Mike feels though, that if someone had to leave, it should be Ken.

Called Receiving Home. Will remove tomorrow.

AF

01-11-88 Meeting with Pat Cahill, Mimi Morgan, Russ Francetich and I met to discuss Margaret Moore case. After discussion, Mimi felt that the foster mother, Marilyn Curtis did not have a good enough relationship with Margaret to be a foster parent by herself. However, our decision was to remove Margaret for her protection.

Mimi Morgan asked for another meeting with Russ Francetich, Pat Cahill and myself with her supervisor, Pet and co-worker, Janet. Pete felt that Margaret had "rights" and that she should remain in the home with the foster family. Also, if Margaret were to leave the home she would be at "risk" as she would feel that she was responsible for the break-up and that she would never report again and she would close herself off. There was lengthy discussion about intervention difference between a natural family and foster care family and the responsibility of a foster family. Casey Family felt that Margaret

was not attached or trusting but felt secure with the Curtis family and that the Curtis family was uncomfortable with the lack of attachment. Although I did not attend all the meeting, DFS stood by their decision about removing Margaret. Mimi Morgan also asked Pat if she could accompany me to the Curtis home 01-12-88 at 5:00 P.M. to talk with the Curtis family and explain the reasons for DFS decision.

Spoke to Damon Gannett, attorney and Guardian Ad Litem for Margaret Moore. He said that, again, he feels that the best possible solution would be to have Ken Curtis leave the family home, and if this is not possible, then Margaret must leave.

Annabeth Felsman, S.W. III

01-12-88 Talked with Pat Cahill and told her that I do not want to be put in a position of defending myself or position with the Curtis family and Mimi Morgan. Also, that I felt this case needed to move forward and that I wanted to talk directly to

the Curtis family and move on. Pat Cahill called Mimi and informed her that I was going to move forward and speak to the Curtis'.

Met.

AF

01-18-88 Finally was able to speak with social worker, George Bulatowicz, 248-1691, of Yellowstone County, Billings. Mr. Bulatowicz is the case manager of the Margaret Moore case. He has had the case since 1985. Peggy Smith was previous worker.

The case file at Yellowstone consists of (4) large volumes. The case first came to light in April 1979. Margaret Moore was seven (7) years old and termed "emotionally disturbed". Her mother was diagnosed as schizophrenic. She has a master's degree in education and worked as a social worker in New York.

Shortly after April 1979, the state asked that parental rights be terminated.

The named father, Frank Fitzgerald, contested. Apparently, the natural mother and he broke up before the mother knew she was pregnant. Frank took necessary blood tests and it was proven that he was Margaret's father. The courts subsequently terminated natural mother's rights and father, Frank took this to the Supreme Court regarding his termination and the lower court decision was overturned. In 1987, the state was given temporary custody of Margaret until she turns 18 years old. The father is considered as a schizophrenic in remission. He is extremely intelligent and brilliant. Frank is very articulate and has been a better attorney than the attorney(s) representing him. He continues to fight for Margaret.

Records indicate that Margaret may have been sexually molested by her birth mother, although this has never been substantiated.

Yellowstone believes that Margaret has

done well at the Curtis residence and she has been there nearly six years. In fact, Margaret uses the last name Curtis instead of Moore.

I asked for a short history of Margaret and names of previous therapist. Mr. Bulatowicz will try and get this together. He stated that he did know that Margaret had seen a Dr. Agusto in Billings but that there was no diagnosis but the evaluation was intended to monitor visitation of Margaret with her father, Frank, in the summer of 1985.

I talked to Mr. Bulatowicz about the possibility of talking to Frank Fitzgerald about the sexual molestation of Margaret. Mr. Bulatowicz agreed but asked for a letter regarding what happened, dates, etc.

Randi Hood, DFS Attorney (444-3865) called to talk about a conversation she was involved in with the Casey Family attorney regarding whose responsibility it is to inform Frank Fitzgerald. Margaret's

natural father, about the sexual assault incident at the Curtis home. Randi still believes that it is Casey's responsibility since they are the managers of the case. I told Randi it made no difference to me who told as long as it happened soon. I suggested that the Yellowstone County people were willing to have Frank Fitzgerald come into their office to discuss the matter since they knew and have a relationship with him. Randi said she'd get back to me.

Annie Felsman, S.W. III

Mimi Morgan's Notes:

Attachment

Sexual abuse victim

Expectations

Change since Chad left

Decisions Tearfulness

Margaret--Tearfulness

Fear of going crazy

Separation -- earlier

Joan Hess-Homeier--staffed case

01-19-88 Damon Gannett (long time with Margaret) GAL. Dad's rights not terminated because of dad's constant legal involvement. Margaret was moved to dad for 6 weeks one summer -- seen by psych there. She regressed while there, according to psych. Curtis' felt she was not herself for a long time later.

Shirley Tiernan, S.W. III

Mimi Morgan's Notes:

Ken: Anger

Displacement

Assuming victim stance

Marilyn: in the middle. No support outside of Ken, Margaret, MZ. {MZ = State Senator Mazurek, legal counsel to Casey Family Program. F.B.F. May 31, 1988.} How to deal with Ken's anger? Confused at information from DFS. Michael Scolatti-- unable to let Margaret be "child" role reversal again. Helpless.

Margaret: regressing?

blame

how to deal with Ken's anger?

power

suicide risk? helpless out of control trying to please no power Marilyn helpless also

Protection from Frank. Ken not move back in -- court order -- 9-1-1.

01-19-88 Talked to Mike Scolatti. He said he was impressed with Ken Curtis and felt that treatment would be between 6 months to one year because he felt Ken understood the dynamics; however, Mike had seen only once. (Would be participating in group therapy.)

Annabeth Felsman, S.W. III

01-20-88 Overall Impression: From the onset of this case, my supervisor, Pat Cahill, and her supervisor, Russ Francetich, were aware of all information and assisted in the decision-making process. Additionally, Regional Administrator, Warren Wright, was consulted.

As a CPS investigation, the duty of the worker is to protect. Worker took several factors into account as well as advice/input from others. In the end, it was decided that the Curtis family would: 1)Consider Ken's removal from the family home; or 2)Margaret Moore would be removed and placed. Subsequently, the Curtis family took responsibility for Ken's actions and he left the family home.

Although I am skeptical about this arrangement because 1)I do not know how committed the Curtis family is in resolving issues (i.e., minimalization of incident and bond of the Curtis' to Margaret and the strength of Marilyn/Margaret relationship given Ken's removal). Ultimately, Margaret may be removed but I feel the impact would be lessened if she were actively involved and had a relationship with a counselor/therapist.

Also, I feel it necessary that Margaret begin therapy <u>immediately</u>. That Ken con-

tinue to work with Mike Scolatti, Ph.D., and participate in group. And that Margaret/Marilyn have counseling and that at some appropriate time all parties participate in family counseling.

My Concerns Regarding Protection

1) Ken Curtis did not voluntarily tell his wife about the sexual abuse incident of November 27, 1987.

2) There is evidence of "grooming" by Ken Curtis of Margaret Moore during the past year (i.e. inappropriate hugging, etc.)

3) Ken Curtis has disclosed that he continues to have sexual feelings about Margaret.

4) Ken Curtis' previous knowledge that Margaret was/is a troubled child.

5) Ken Curtis, having already sexually assaulted Margaret, tells his wife that Margaret is withdrawing from him because she thinks he is going to sexually abuse her.

6) Curtis' family has essentially been

without a worker until Mimi Morgan was assigned to the case, August 1987.

7) Mrs. Marilyn Curtis minimized the situation (what is expected) by saying this incident would not have happened if Ken would not have had corrective nose surgery and the medication effected his judgment.

8) The belief of both Ken and Marilyn that this incident could be the one to bring the family together.

Plus -- After Ken Curtis was strongly encouraged by his wife to repeat incident to Mimi Morgan, Ken began counseling with Mike Scolatti shortly after.

Factors

1) Margaret Moore has been at Curtis home since 10-17-81 -- six years. Needs therapy as soon as possible and all background info/history and her previous contacts with therapists will need to be provided.

2) Margaret has not been seeing an ongoing therapist for past/present problems.

3) Margaret frightened of natural father,

Frank Fitzgerald, finding out about incident.

4) 01-13-88 Mimi Morgan states that Margaret "hears voices".

5) Margaret Moore previous victim of sexual abuse. (Yellowstone County)

6) Margaret "aversion to men" as she says.

7) Access of Margaret by Ken Curtis (business teacher) -- both at school and at home (mother works).

8) Guardian Ad Litem, Attorney Damon Gannett of Billings, is adamant about either Ken Curtis leaving the home or Margaret being removed.

9) Case worker, George Bulatowicz (Billings), Margaret's case manager, feels that Margaret must leave the home if Ken doesn't.

10) Margaret's fear that she is crazy.

11) Issue that Margaret is not attached or trusting of the Curtis family, but feels secure.

Annabeth M. Felsman, S.W. III

01-21-88 1) Who will do what with family?

2) How was decision made to remove M. or K.?

3)Releases of information -- who?

4) Direction we're going

5) Licensing

Casey will pay for Margaret's and foster mom's (Marilyn) therapy.

Conflicting roles?

Casey continues to provide care, custody, control -- Margaret & W/ K. and M. around Margaret.

Ken -- DFS responsibility to determine his contact with Margaret.

Casey: biological father does not have right to be informed. Order only gives him visitation rights -- arranged by Casey. "Strange order"

April 1979 -- SRS Billings removed; Margaret hadn't known this man as her father.

November 1980 -- his paternity established. Since 1980, he's been seeking

to overturn order.

1985. Margaret six-week evaluation visit to father. DR recommended placement with Curtis.

Mother -- psychotic

Father -- psychotic -- paranoia -- did detective "work" on family. Stayed in car outside house. Father capable of doing anything to harass family. {false entry, F.B.F. May 31, 1988}

M. had visit Christmas. M. has wanted visits -- five days at a time -- winter and summer (Frank and Velma). Brings back possessions of her mother's.

Margaret has positive relationship with her maternal aunt. Paternal grandmother ill now. SRS temporary custody until 18. Agreement -- placement continues with Casey.

Issue: a) Should natural father be informed?

b) Who informs him? DFS

Margaret not anxious for father to

know.

Casey looks at foster parents closer to biological parents -- long term.

Casey wants Margaret to remain in family -- with therapy -- sees possible positive outcome.

Concerns: rules , expectations -- who's involved? Who has control over Margaret?

Scolatti -- six to eight weeks before Ken coming home.

Licensing: Provisional six month Marilyn is licensed. Not Ken -- Margaret has say.

Visitation Can begin now -- no overnights. Not alone together -- Margaret and Ken. Ken spend night -- without Margaret there. Need to be in writing.

Contract -- DFS -- legal; case management. Casey and DFS are together.

1) Contract -- treatment -- service agreement Agencies / foster parents

2) Releases

3) See Curtis family

Update report to court on this case--

check with /Leslie / Randi.

Police Report on Curtis (check) Bob Reid -- Brett Sells (City Police)

Tues. 26th -- 9 MZ's office

Tues. 26th -- S -- see Curtis family

Licensing: Accountability: District Office S/ MZ -- set down rules -- check with Scolatti re: Ken keeping treatment.

Releases: Casey Family Program, Ken, Joan H-H, Scolatti, Damon Gannett Attorney at Law 720 No. 30th St. Billings, MT 59101 406-245-6338, Guardian Ad Litem

Margaret Moore 2:20 P.M.

01-21-88 At CPS Team meeting, Mike Scolatti, Ph.D., disclosed that Ken Curtis began group sessions last night. Also, that he (Ken) felt that he acted out of anger towards Margaret because she was not close to him and that he has been spying/peeking at Margaret for some time.

Worker was concerned more so about the "violent" aspect of this act. Not approached as a "loving seduction" but out

of violence. Rape is not for sexual gratification, but violence.

Annie M. Felsman, S.W. III

01-22-88 PCF George Bulatowicz. re: Annie F. George told Frank Fitzgerald. He said he talked with Leslie.

Smith and Co. -- book

443-4730 Casey Family Program

2:30 P.C. to Casey related information to Pete and MZ. {Pete is Pete Surdock, Jr., Casey state director, MZ is State Senator Mazurek, legal counsel to Casey Family Program. F.B.F. May 31, 1988}

P.C. to George Bulatowicz 248-1691.

Shirley V. Tiernan, S.W. III

01-27-88 Defense mechanism have had chance to rebound. Wife convinced him is minor. 6-8 weeks (Mike) "needs to do penance."

ST

02-05-88 Randi Hood -- DFS Attorney. Received letter from Frank -- asking to look at DFS files.

No professional records (no material

done by anyone else).

Only information relating to child--father has filed new letter to us, Supreme Court.

Address: Frank Fitzgerald
3000 Hallowell Lane
Billings, MT 59101

ST

02-08-88 Margaret displacing her anger at Ken on Frank. Fear feeding her anger--where is the (her) anger at Ken right now. Has Marilyn felt her real anger toward Ken? The ethic doesn't allow anger. Forgiveness happens too soon.

M.C. -- mixed feelings about Ken returning before some of above is resolved.

Marilyn very isolated. May see Joan in therapy. Margaret putting so much anger in statement and at DFS.

Shirley V. Tiernan, S.W. III

02-09-88 P.C. from Joan H.H. Margaret feels bad about Ken being out of the home. Joan wonders if Ken being punished, or if

he's really dangerous to Margaret.

From Margaret's statements, Joan feels that Margaret doesn't consider Ken to be a threat to her. M. feels too much is being made of the incident.

02-18-88 Met with Marilyn Curtis and Mimi Morgan. Discussed Marilyn's feelings and responses regarding her family situation. She is planning to continue with Dr. Joan Hess-Homeier, who is also Margaret's therapist. Marilyn stated that she believes this incident has helped to bring her, Ken and Margaret closer. They are much more able to talk about family problems. Margaret wrote a letter to Frank F., telling him how she feels. Margaret seems to like talking with Dr. Joan H-H.

Shirley V. Tiernan, S.W. III

02-19-88 Received letter from Dr. Michael Scolatti stating that he feels it is safe for Ken Curtis to return to the home.

P.C. to Marilyn Curtis relaying information that Ken can return home. He will

continue working with Scolatti until released by Scolatti. They will also continue to work with Mimi Morgan, Casey.

SVT

02-22-88 P.C. from Ralph Herriott, Frank Fitzgerald's attorney. (406) 248-3138.

P.C. to Leslie Taylor. DFS gives F.F. only DFS product. She suggests we call Casey Family Program to see if they object to giving their dictation.

Re: Supreme Court. F.F. didn't file with Supreme Court for appeal. {false entry. F.B.F. May 31, 1988}

P.C. to Ralph Herriott 315 N. 24th Billings, MT 59101

He asks that DFS send him a copy of the file. He will share with F. Fitzgerald.

P.C. to Casey Program. Requested they allow their recordings to be included in DFS file -- permission was not give.

Shirley V. Tiernan, S.W III

{end of PROGRESS SUMMARY AND SERVICE PLAN REVIEW}

INTAKE REFERRAL

Case Name: Curtis, Ken & Marilyn

Investigation: Sexual Abuse

Case No: 32-36787

Date: 22 Dec 1987

Children: Margaret Moore (foster child)

Birthdate 06/10/72; Age: 15; Sex: F

School: Sentinel - 728-2403

Grade: Soph

Victim: checked

Address: 81 Lacota, Msla, Mt

Phone: Home 251-3326

Adults: Ken Curtis; Age: 41

Employment: Sentinel HS - Business teacher

Relationship: Foster father

Marilyn Curtis

Employment: Dr. Hickman

Relationship: Foster mother

Nature of Referral:

Margaret Moore has lived at the home of Ken & Marilyn Curtis since 10/17/81. The Casey Family is involved in the payment,

support and supervision of the foster home. The state has licensed this home and Margaret is in the custody of DFS til age 18 yrs. This case comes from Yellowstone Co. and the Guardian ad litem is in Billings.

Mimi Morgan of Casey Family made a routine visit to the Curtis family on Dec. 21, 1987. At that time, Ken told her about an incident which occurred Nov. 28, 1987. Said he had gone into Margaret's room to wake her up and fondled her breasts.

Margaret Moore told Mimi that Ken woke her up and he was touching her breasts, She told him to get out and he did.

Ken since has asked Margaret's forgiveness and is will to see someone. Ken is upset as Margaret is not distant from him.

Margaret disclosed to Mimi that she had been warned that Ken would molest her and he did. She is frightened and is

withdrawn.

Ken states and acknowledges that he has sexual feelings about Margaret; Margaret has been a victim before and Ken knew it and Ken did not disclose to his wife- Margaret did on Dec. 19 while driving to the mall. Initially, Marilyn did not believe Margaret, then said she did. Marilyn then confronted Ken.

Mimi believes that Margaret has a high degree of trust in her and Mimi feels that Margaret is a disturbed kid. Margaret is restricted, rigid, and cold. Margaret's natural parents are mentally disturbed.

Although Margaret has been a victim of sexual abuse in the past, she has not seen a counselor. Casey Family was hesitant to bring the subject up since Margaret is fearful of being like her natural parents.

STATE OF MONTANA

Department of Social and Rehabilitation Services Referral for Suspected Sexual

Abuse. Date: 29 Dec. 1987

TO: Missoula County Sheriff's Office

From: Annie Felsman, SW III, Referring CPS Worker, Phone Number 721-9360

Re: VICTIM Margaret Moore

DOB: 6/10/72

Resides with: Ken & Marilyn Curtis

Address: 81 Lacota, Msla, MT

Phone: 251-3326

ALLEGED OFFENDER: Ken Curtis

Relationship to victim: Foster father

Address: 81 Lacota, Msla, MT

Phone 251-3326

DOB: 10/15/46

REFERRANT TO CPS: Mimi Morgan, Social Worker w/ Casey Family Program

Address: 101 E. Broadway

Phone: 543-3632

Date of Referral 12/22/87

Dear Detective,

This case has not been investigated, yet, by our office. See attached memo. Victim, Margaret Moore is at her natural

father's home in Billings until Jan. 3, 1988.

MISSOULA COUNTY OFFICE OF HUMAN SERVICES

301 WEST ALDER, MISSOULA, MONTANA 59802

TO: City Police

SUBJECT: Sexual Abuse Referral

DATE: 12/29/87

MESSAGE

Mimi Morgan, Social Worker for the Casey Family Program informed me that Ken Curtis disclosed to her that he had fondled foster child, Margaret Moore on November 28, 1987.

Margaret Moore stated that Ken had entered her room to wake her up and began touching her breasts. She told Ken to get out and he did.

Other information - Margaret has been a foster child in the Curtis home since 1981; Ken acknowledges sexual feelings for Margaret; Margaret has been a victim of sexual abuse before being placed at the Curtis home; Ken did not tell his wife of this incident - (Dec 19) Margaret did; Ken has asked Margaret's forgiveness and is o-

pened to help.

Signed By Annabeth Felsman, SW III

CSD-110A (Rev. 5/84)

State of Montana

Department of Soc. & Rehab. Services

REPORT ON CHILD PROTECT. SERV. REFERRAL

REFERRAL INFORMATION

1. Family Name: Curtis, Ken & Marilyn

2. K #: 32-36787

3. Street Address: 81 Lacota, Msla 59803

4. Relationship of Referral Source to Client: 12.Human Services

5. Family Phone: 251-3326

6. County #: 4

7. Case Worker #: --

8. Referral Date: 12/22/87

CLIENT INFORMATION

10. SSN: -

11. Last Name: Moore; First Name: Margaret

12. Birth Date: 6/10/72

13. Sex: F

14. Ethnicity Code: 1. Caucasian

15. AKA: -

CASE DETERMINATION

16. Complaint code: ABUSE: SA - Sexual

17. Children Involved: 1

18. Case Determination code: S - Substantiated

19. Perpetrator to Client Relationship Code: A - Parent

20. Investigation Start Date: 1/6/88

21. Investigation Completion Date: 1/6-/88

22. Services Provided: (Circle all that apply)

B. Social Work Counseling

C. Resource Referral

G. Referral - Law Enforcement

I. Referral - County Attorney - Criminal

23. Current Case Status: (Circle one):

A. Case Open

24. Investigating Worker's Signature:

Annabeth M. Felsman

26. Date Submitted: 1/7/88

THIS INFORMATION IS CONFIDENTIAL AND IS USED BY THE COMMUNITY SERVICES DIVISION FOR ADMINISTRATION OF PROGRAM SERVICES AC-

CORDING TO POLICY SECTION CSD 104 OF THE DIVISION'S ADMINISTRATIVE MANUAL.

DEPARTMENT OF FAMILY SERVICES
STATE OF MONTANA, TED SCHWINDEN, GOVERNOR
406-721-9360
301 WEST ALDER MISSOULA, MONTANA 59802

JANUARY 13, 1988

Pat Cahill, S.W.S. II
DFS Office, Missoula County
301 W. Alder
Missoula, MT 59802

Dear Pat,

In regard to the care of minor child, Margaret Moore, a decision has yet to be made regarding the question of who is to inform the natural father, Frank Fitzgerald, of the sexual abuse of Margaret by foster father, Ken Curtis.

I spoke to the Department of Family Services attorney, Randi Hood, on January 11, 1988. It was her opinion that since the state had temporary custody of Margaret until aged 18, that the natural father, Frank Fitzgerald, had a right to know.

Further, Randi felt that it was the responsibility of Casey Family to inform him since they manage this case.

The subject of telling Casey that they will need to discuss this with Mr. Fitzgerald has been skirted by Casey.

I believe, however, that since that decision of this case was the states and that we do have custody, it should be our responsibility

As a practical matter, a telephone call to Mr. Fitzgerald would be inappropriate. I suggest that the Billings' office handle this in their office as both supervisor and caseworker are familiar with this case and with Mr. Fitzgerald.

Please advise.

Sincerely,

Signature: Annabeth M. Felsman,
Social Worker III

Pat Cahill
Social Worker Supervisor II

AMF: hw

DEPARTMENT OF FAMILY SERVICES
STATE OF MONTANA, TED SCHWINDEN, GOVERNOR
406-721-9360
301 WEST ALDER MISSOULA, MONTANA 59802

JANUARY 13, 1988

Mr. Damon Gannett
Attorney At Law
720 No. 30th
Billings, MT 59101-0097

Dear Mr. Gannett:

Please be informed that Mr. Ken Curtis has decided to leave the family home.

Personally and professionally, I feel this is the most appropriate resolution as the Curtis family is taking responsibility and Margaret will be allowed to stay in the family home.

It is the hope of this agency to reunite this family and steps will be taken to monitor and manage the placement to that end.

Sincerely,

Signature: Annabeth M. Felsman,

Social Worker III

Pat Cahill

Social Worker Supervisor II

AMF: hw

DEPARTMENT OF FAMILY SERVICES
STATE OF MONTANA, TED SCHWINDEN, GOVERNOR
406-721-9360
301 WEST ALDER MISSOULA, MONTANA 59802

JANUARY 13, 1988

Mike Scolatti, Ph.D.
2831 Ft. Missoula Rd., Suite 305
Missoula, MT 59801

Dear Mike:

Please be informed that Ken Curtis and his wife, Marilyn, have decided that Ken will leave the family home.

I personally feel that this decision is in the best interest of the minor child, Margaret Moore Curtis. Not only has the family taken responsibility but hopefully, Margaret will not feel the burden that it was her "fault".

Measures will be taken to reunify this family under the same roof.

Sincerely,

Signature: Annabeth M. Felsman,

Social Worker III

Pat Cahill

Social Worker Supervisor II

AMF: hw

SERVICE TREATMENT AGREEMENT

Department of Family Services and the Casey Family Program Agreement

1. The agencies will maintain assessment and treatment of Ken and Marilyn Curtis and Margaret Moore during the time DFS and the Casey Family Program are working cooperatively with the family.

2. The agencies will work together to determine how, when and if the family will be reunified.

3. The agencies will provide counseling and information to family members regarding interagency arrangements, communications and each member's treatment goals.

Family Agreement

1. Ken Curtis will be in therapy with Michael Scolatti, Ph.D. until Dr. Scolatti reports that treatment in his program is no longer necessary.

2. Ken Curtis will only have contact with Margaret Moore supervised by Marilyn Curtis, DFS staff or the Casey Family Pro-

gram staff.

3. Ken Curtis will remain out of the home overnight until recommended by DFS, Dr. Scolatti and Dr. Joan Hess-Homeier. Ken Curtis will be permitted to stay overnight in the home if Margaret Moore is staying elsewhere overnight.

Signature: Shirley V. Tiernan, Representative Department of Family Services

Signature: Mimi Morgan, Representative The Casey Family Program

Date: 1-29-88

Signature: Ken Curtis

Signature: Marilyn Curtis

Signature: Margaret Moore (Curtis)

This agreement will be reviewed no later than February 29, 1988

MICHAEL J. SCOLATTI, Ph.D.
COMMUNITY PHYSICIAN CENTER 2
2831 FORT MISSOULA ROAD, SUITE 305
MISSOULA, MT 59801
Telephone 728-4100, ext. 5445

received FEB 19 1988

February 15, 1988

Shirley Tiernan, SRS
301 West Alder
Missoula, Montana 59802

Dear Ms. Tiernan:

This letter is in regards to Mr. Ken Curtis. As we discussed in our telephone conversation on 02-10-88, I do not feel that Mr. Curtis is a threat to his daughter, nor do I feel that he needs to be segregated from his family any longer.

If you have any additional questions please contact me at your convenience.

Sincerely,

Signature: Michael J. Scolatti, Ph. D.
Licensed Clinical Psychologist

MJS/sm

DEPARTMENT OF FAMILY SERVICES

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR

406-721-9360

301 WEST ALDER MISSOULA, MONTANA 59802

FEBRUARY 19, 1988

Ms. Mimi Morgan

Casey Family Program

101 W. Broadway, Rm 401 Re: Ken & Marilyn

Missoula, MT 59801 Curtis Foster Home

Dear Mimi,

In a letter dated February 15, 1988, Dr. Michael Scolatti states that he does not feel that Mr. Ken Curtis is a threat to his daughter, Margaret Curtis (Moore), and feels that Ken Curtis need not be segregated from his family. Because of this, I recommend that Ken Curtis return to the family home.

I have sent a copy of Dr. Scolatti's letter to Russ Francetich, SWS III. Mr. Francetich informs me that the Curtis license has been changed to a provisional license for Marilyn Curtis, only. This

will be in effect until August 1988, when it will be reviewed by a licensing worker.

The DFS doe request that Ken Curtis continue his participation in Dr. Scolatti's offender group until such time as Dr. Scolatti feels Mr. Curtis is ready to graduate. DFS also recommends that Margaret continue psychotherapy with Dr. Joan Hess-Homeier and that the Casey Family Program worker continue to work closely with this family.

Sincerely,

Signature: Shirley v. Tiernan Social Worker III

Arlene R. Grossman

Social Worker Supervisor II

SVT:hw

cc: Ken and Marilyn Curtis, 81 Lacota, Missoula, MT 59803

Damon Gannett, Attorney at Law

720 No. 30th

Billings, MT 59101

APPENDIX P (Typed Copy)

81 Lacota Drive

Missoula, MT 59803

Feb. 17, 1988

Mr. and Mrs. Frank Boring Fitzgerald

3000 Hallowell Lane

Billings, MT 59101

Dear Honest Frank and Mrs. Velma,

Hi! Before I say anything else, I want you to know that I am not recieving any help in writing this letter. I have not been "brain washed". I need to write this letter for my own sake, to express my feelings. It is about time that I do something about them.

I am doing fine right now. Velma, you said I was missing a GREAT opportunity to practice driving. I am driving now.

I know that you heard about what has happened here. And you do not need to hear about it from me. I wish you would

act like normal people and stop "beating around the bush". An average person would say,"I heard you have had some problems. Would you like to write or call to talk about it?" **Frank**ly, I believe that it was none of your business in the first place.

Just to let your minds at rest, I am seeing a psychologist. Ken (I call him "Dad" because I love him, and he is a father to me.) is getting therapy. Frank, I have a very major "bone to pick with you". First of all **Dad**, is honest. He admitted to what he did, and that it was wrong. He is the one who told Mimi about it. He agreed to go to therapy and is doing everything that he can do to make that wrong a right.

I did not like that little SUBTLE hint you inferred when you signed,"YOUR HONEST DAD, FRANK". If you are so honest, why am I illegitimate? Why did you say "That bitch Marilyn wrote to Jewel." She did not. I am still angry about Velma calling

her a bitch. Marilyn is someone who I love very much and she is my mother. You were insulting me, along with my mom. Velma, I wish you would open your eyes. And I don't mean that sarcastically. Mom has never done anything to you. Neither has Dad. They have done what they were told to. Vince said in the surprise visits you made when I first came, I was not supposed to have seen either of you. You didn't have visiting rights then.

I wish you would be direct in what you say, instead of being phony with me. I am almost 16, and I can see through your games. If you really have something to say, as with my Grandma, say it. If not, then don't say it.

You know I do appreciate the things you have done for me and gifts you've given me, but I really love my family here. I love Dad, Mom, Chad, and Schatzi. I love Missoula, my home and security. I like my friends here. I like my school. I have

adjusted to this life. I don't plan to change it for at least two and a half years.

I can't take the pain of having to leave another family. It is like having all of your loved ones die. Can't you see that I am not just a possession? I'm not a piece of furniture you can fight over. I have feelings and emotions that are impossible to overlook. My personality is formed now. There is no way you could change me to be the person you would want. Can't you understand that I am almost grown-up and I want to stay here?

Please don'[t write books or pamphlets about my life. My life is personal and private to me. So is my mother Jewel's. We don't go around telling everyone all the details of your life or ours. It is embarrassing. Please face reality and respect our private lives as we respect yours. Please try to understand that I am a teenager. I am growing up, and I need

independence and control of my life. Do you understand what I am trying to say? Consider my feelings.

{hand-written ending here} Sincerely,

Margaret

P.S. My name is Margaret Ann Curtis. Please accept it, because it's the name I go by.

{beginning of 3 hand written pages written like a child of 7 using different colored pens}

Dere Velma

See Margaret write. Write. Write. Write. Margaret writes to Velma. Velma is HAPPY! See Velma read. Read. Read. Read. Velma thinks Margaret is 7 years old. Margaret writes as 7 years old. Margaret is smart.Margaret knows her colors. This piece of envelop is hot pink This color is red. There is a difference. can Velma say "Color"? Margaret is doing wonderful good.

Margaret likes her new friend,Joan. Joan is a psychologist. Can Velma say "Psychologist"?

Margaret tells joke. Margaret is funny. (Ha Ha Ha) Here is Margaret's joke:

Knock Knock

Who's there?

Annie.

Annie who:

Annietime now Velma will stop writing to Margaret as if Margaret was 7 years old Margaret doesn't like being 7 years old. Margaret likes being 15 years old.

Margaret says goodbye. Can Velma say goodbye?

{picture of a paw print}

{picture of smiling Mr. Balloon}

See Schatzi's footprint

P.S. Wasn't Margaret's joke Funny?

{picture of Mr. Sunshine}

APPENDIX Q (Typed Copy)

{underlined are filled in places, unless already on the form}

YELLOWSTONE COUNTY WELFARE DEPARTMENT

Date: 4-25-79

To: Fran

From: Peg Smith

Re: Margaret Moore (Birthdate) 6-10-72

Authorization to:

Place a child in foster care (X)

Reason for Placement: Possible sexual abuse

Plan for Child: (Include how long they will be in foster care) Pending determination of safety of home.

Name and Address of Foster Parents: (Include how many other foster children there) Rhoda Phillips - none

Relatives: (Who might be interested in child - have they been contacted, can they help) Relatives - out of state

Custody: Temporary (X)

County of Financial Responsibility: Yel-

lowstone

County of Service: Yellowstone

(PLEASE NOTE) No foster home agreement should be signed for more than 30 days except in special cases.

Sig: Peggy Smith, Social Worker

COUNTY APPLICATION FORM

FOSTER CARE:

ADC Related (X)

CWS (X)

NAME: Margaret Ann Moore

DATE OF BIRTH: 6-10-72

SOCIAL SECURITY NUMBER: 751-30-1362

CUSTODY: Temporary (X)

ELIGIBLE FOR SERVICES ON BASIS OF: Possible sexual abuse

VERIFICATION FOR ELIGIBILITY:

RESIDENCE: Mother - Jewel Moore owns home at 318 Terry - Billings, Mt

DEPRIVATION AND NEED: Child Pro. Serv.

RECOMMENDATION: Pend - following results of investigation Recommend approve FHC-ADC related for Margaret Moore b/d 6-10-72 56-27798, eff 4-10-79 at $125.00/mo

PAYEE: Rhoda Phillips - 12 Riley, Blgs, Mt

BY: Sig: Peggy Smith (Worker)

EFFECTIVE DATE: 4-10-79 (FHC)

BOARD APPROVAL Sig:Duane Christiansen

DATE MAY 8, 1979

COUNTY APPLICATION FORM

FOSTER CARE:

Regular (X)

GR (X)

NAME: Margaret Ann Moore

DATE OF BIRTH: 6-10-72

SOCIAL SECURITY NUMBER: 751-30-1362

ADDRESS:Cline Rd Rt #3 HOUSEHOLD 56-27798

CUSTODY: Permanent (X)

ELIGIBLE FOR SERVICES ON BASIS OF: CWS

VERIFICATION FOR ELIGIBILITY:

RESIDENCE: Child born in Blgs

DEPRIVATION AND NEED: Child Under Custody of SRS

RECOMMENDATION: Recommend approve GR - for Margaret Moore b/d 6-10-72 for tissue typing, etc. Code ADC

PAYEE: Immunological Associates, Box 6351 Denver 80206

BY: Sig: Peggy Smith (Worker)

EFFECTIVE DATE: GR 4-21-80 (X)

DATE JUN 17, 1980

SRS-SS-77 (new 6/79) MONTANA DEPT. OF SOCIAL & REHABILITATION SERVICES Social Services Bureau

REVIEW OF TEMPORARY PLACEMENT

Child's Name: Margaret Moore

Review Date: 11-19-80

I. Is the original reason for placement still valid? What is preventing child from returning home? Court action pending on rts of father - mother's rts terminated

II. What is overall goal now? [X] Adoption

III. How soon can permanency be established for the child? Depends on availability of Court - no date scheduled

IV. Case plan to achieve permanency: Child to remain in foster care (Phillips) who plan on adoption

V. Additional comments: Foster parents may move from county -

Names of Workers involved in case staffing: Gary D. Huffmaster; Vi Hustad

Worker initials P.S. Super initials VH

Next Review Date: 2-81

SRS-SS-77 (new 6/79) MONTANA DEPT. OF SOCIAL & REHABILITATION SERVICES Social Services Bureau

REVIEW OF TEMPORARY PLACEMENT

Child's Name: Margaret Moore

Review Date: 4-22-81

I. Is the original reason for placement still valid? What is preventing child from returning home? Mother's rts terminated - Still in Court process of father's rts.

II. What is overall goal now? [X] Perm. Foster care SRS is requesting permanent custody of Margaret c rts of visitation for the father

III. How soon can permanency be established for the child? Years - if father doesn't obtain custody he will appeal to state and federal.

IV. Case plan to achieve permanency:

1) Court process 2) retain Margaret with Phillips family

V. Additional comments: 1) Foster family has moved to Carbon county; 2) Foster family has alcoholic problems; 3) Joint supervision c Carbon; 4) set meeting c Carbon & Joe

Names of Workers involved in case staffing: Gary D. Huffmaster; Vi Hustad

Worker initials P.S. Super initials VH

Next Review Date: 6-81

SRS-SS-77 (new 6/79) MONTANA DEPT. OF SOCIAL & REHABILITATION SERVICES Social Services Bureau

REVIEW OF TEMPORARY PLACEMENT

Child's Name: Margaret Moore

Review Date: 6-10-81

I. Is the original reason for placement still valid? What is preventing child from returning home? Mothers rts termination - Pending results of father's rts from Court

II. What is overall goal now? [X] Other (explain) outcome of Court hearing

III. How soon can permanency be established for the child? Depends on result of Court hearing - father plans on appeal to Supreme Court

IV. Case plan to achieve permanency: Problems with placement - foster home is unstable due to alcoholism of foster father. Now foster home is single parent. Team approach to resolve placement -

Names of Workers involved in case staff-

ing: Violet Hustad; Gary D. Huffmaster

Worker initials P.S. Super initials VH

Next Review Date: 8-81

SRS-SS-77 (new 6/79) MONTANA DEPT. OF SOCIAL & REHABILITATION SERVICES Social Services Bureau

REVIEW OF TEMPORARY PLACEMENT

Child's Name: Margaret Moore

Review Date: 9-23-81

I. Is the original reason for placement still valid? What is preventing child from returning home? Permanent custody granted

II. What is overall goal now? [X] Perm. Foster Care

III. How soon can permanency be established for the child? Casey program has accepted Margaret Pre-placement visits have started

IV. Case plan to achieve permanency: One month of placement visit - Margaret to live with Curtis family in Missoula

Names of Workers involved in case staffing: Gary D. Huffmaster; Violet Hustad

Worker initials P.S. Super. initials ____

Next Review Date: _____

[X] 13th JUDICIAL DISTRICT REVIEW OF FOSTER CARE

REPORT TO THE REVIEW COMMITTEE

CHILD'S NAME: Margaret Moore

AGE: 10 B/D: 06-10-72

ETHNIC: X CAU

REVIEW DATE: 10/07/82

TYPE OF CUSTODY: X P.C.SW: PeggyO'Leary

1. DATE PLACED: 04/10/79

2. REASON FOR PLACEMENT: Mental illness of mother.

3. TYPE OF PLACEMENT: Is the placement the least restrictive and as close as possible to the parent's home so as to facilitate visitation? Casey Foundation [X] Foster Home

Location: City: Missoula State: Montana

4. VISITATION: None - parental rights terminated Visitation not allowed

5. OVERALL GOAL FOR THE CHILD: [X] Permanent Foster Home Care

By: (Date) Current

6. TREATMENT PLAN: CHILD & PARENTS

If the plan is to return the child home, what efforts must be made by the agency and parents before the child can return home? If the plan is not to return the child home, what are the reasons?

Parental rights terminated. Father is appealing the termination. He plans to take through the state and federal system. Child is in permanent care - good attachment - A student - no noted problems. She will remain in same family if court issue is resolved.

7. SERVICES PROVIDED TO THE CHILD, PARENTS, FOSTER PARENTS DESIGNED TO RETURN THE CHILD HOME OR TO FACILITATE OR MAINTAIN PERMANENCY.

X Counseling and case management services by the C.P.S. worker

X Mental Health Counseling

X Psychological evaluation

X Foster home care

REPORT OF THE FOSTER CARE REVIEW COMMITTEE

CHILD'S NAME: MOORE, MARGARET

1. Is this placement the least restrictive? X YES

2. Is the placement as close as possible to the parent's home? X N/A

3. Has/Did the social worker made/make appropriate arrangements for parent-child visitations? X N/A

4. Can the child return home? X NO

5. Has/Did the social worker identified-/identify the efforts that must be made by the parents and agency before the child can/could return home? X N/A

6. Have/Were reasonable efforts been made by the placing agency to return the child to his or her home? X N/A

7. Has an expectant date for permanency been established? COMMENTS: Depends on appeal

8. Are the child, parents, foster parents receiving appropriate services? X YES

9. Does the child's treatment plan need to

be modified? X NO

Respectfully submitted:

1. Ted Lechner, District Court Services
2. Gary Huffmaster, SRS
3. Carol Gannett, Judicial Appointee
4. Lynn Montague, Judicial Appointee
5. Gary W. Roger, School District #2
6. Gayle Tompkins, Judicial Appointee

[X] 13th JUDICIAL DISTRICT REVIEW OF FOSTER CARE

REPORT TO THE REVIEW COMMITTEE

CHILD'S NAME: Margaret Moore

AGE: 10 B/D: 06-10-72

ETHNIC: X CAU

REVIEW DATE: 4-28-83 NEXT REVIEW 10-83

TYPE OF CUSTODY: X P.C. SW: PeggyO'Leary

1. DATE PLACED: Initial 04/10/79 Current- 10-17-81

2. REASON FOR PLACEMENT: Parental rights terminated due to mental illness of parents.

3. TYPE OF PLACEMENT: Is the placement the least restrictive and as close as possible to the parent's home so as to facilitate visitation? [X] Foster Home - Casey Family Foundation

Location: City: Missoula State: Montana

4. VISITATION: None - parental rights terminated N/A It is being requested through court action

5. OVERALL GOAL FOR THE CHILD: [X] Perma-

nent Foster Home Care By: 10-17-81

6. TREATMENT PLAN: CHILD & PARENTS

If the plan is to return the child home, what efforts must be made by the agency and parents before the child can return home? If the plan is not to return the child home, what are the reasons?

Parental rights terminated. Father is appealing the termination. He plans to take through the state and federal system. Child is in permanent care - good attachment - A student - no noted problems. She will remain in same family if court issue is resolved.

7. SERVICES PROVIDED TO THE CHILD, PARENTS, FOSTER PARENTS DESIGNED TO RETURN THE CHILD HOME OR TO FACILITATE OR MAINTAIN PERMANENCY.

X Counseling and case management services by the C.P.S. worker

X Mental Health Counseling

X Psychological evaluation

X Foster home care

REPORT OF THE FOSTER CARE REVIEW COMMITTEE

CHILD'S NAME:MOORE, MARGARET Date:04/28/83

1. Is this placement the least restrictive? X YES

2. Is the placement as close as possible to the parent's home? X YES

3. Has/Did the social worker made/make appropriate arrangements for parent-child visitations? X YES

4. Can the child return home? X NO

5. Has/Did the social worker identified-/identify the efforts that must be made by the parents and agency before the child can/could return home? X YES

6. Have/Were reasonable efforts been made by the placing agency to return the child to his or her home? X YES

7. Has an expectant date for permanency been established? X YES

8. Are the child, parents, foster parents receiving appropriate services? X YES

9. Does the child's treatment plan need to be modified? X NO

COMMITTEE RECOMMENDATIONS: Recommend that Margaret appear in own behalf - Currently in legal process Supreme Court - placed in Casey Foundation - Committee believes this girl should remain in Casey and never to return to parents.

Respectfully submitted:

1. Ted Lechner, District Court Services
2. Gary Huffmaster, SRS
3. Gayle Tompkins, Judicial Appointee
5. Gary W. Roger, School District #2
6. Lynn Montague, Judicial Appointee
7. Dwight MacKay, Judicial Appointee

[X] 13th JUDICIAL DISTRICT REVIEW OF FOSTER CARE

REPORT TO THE REVIEW COMMITTEE

CHILD'S NAME: Margaret Moore

AGE: 10 B/D: 06-10-72

ETHNIC: X CAU

REVIEW DATE: 11-21-83 NEXT REVIEW 5-84

TYPE OF CUSTODY: X P.C.SW: PeggyO'Leary

1. DATE PLACED: 4-10-79

2. REASON FOR PLACEMENT: Mental illness of mother

3. TYPE OF PLACEMENT: Is the placement the least restrictive and as close as possible to the parent's home so as to facilitate visitation? [X] Foster Home - Casey Foundation

Location: City: Missoula State: Montana

4. VISITATION: None - parental rights terminated - Visitation not allowed

5. OVERALL GOAL FOR THE CHILD: [X] Permanent Foster Home Care By: (date) Current

6. TREATMENT PLAN: CHILD & PARENTS

If the plan is to return the child

home, what efforts must be made by the agency and parents before the child can return home? If the plan is not to return the child home, what are the reasons?

Parental rights terminated. Case is being appealed by father. State supreme court has case. It appears that a new hearing will be ordered. The foster family wishes and Margaret wishes to continue with her family forever.

7. SERVICES PROVIDED TO THE CHILD, PARENTS, FOSTER PARENTS DESIGNED TO RETURN THE CHILD HOME OR TO FACILITATE OR MAINTAIN PERMANENCY.

X Counseling and case management services by the C.P.S. worker

X Mental Health Counseling

X Psychological evaluation

X Foster home care

REPORT OF THE FOSTER CARE REVIEW COMMITTEE

CHILD'S NAME:MARGARET MOORE Date:11-21-83

1. Is this placement the least restrictive? X YES

2. Is the placement as close as possible to the parent's home? X N/A

3. Has/Did the social worker made/make appropriate arrangements for parent-child visitations? X YES

4. Can the child return home? X NO

5. Has/Did the social worker identified-/identify the efforts that must be made by the parents and agency before the child can/could return home? X N/A

6. Have/Were reasonable efforts been made by the placing agency to return the child to his or her home? X N/A

7. Has an expectant date for permanency been established? X NO

8. Are the child, parents, foster parents receiving appropriate services? X YES

9. Does the child's treatment plan need to be modified? X NO

Respectfully submitted:

1. Ted Lechner, District Court Services
2. Gary Huffmaster, SRS
3. Carol Gannett, Judicial Appointee
4. Gayle Tompkins, Judicial Appointee
6. Dwight MacKay, Judicial Appointee
7. Lynn Montague, Judicial Appointee

APPENDIX R (Typed Copy of a best available copy)

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF	)	Cause
MARGARET GERALDINE MOORE,	)	No. DJ-79-188
Youth in Need of Care.	)	STIPULATION

Following the conclusion of testimony taken in regard to this matter, evidence was brought to the attention of all parties which should be made a part of the record and by this stipulation it is hereby agreed upon to be and is a part of the record and facts on file herein:

1. That the minor child Margaret Geraldine Moore has been in the temporary custody of foster parents Mr. and Mrs. Phillips and following the termination of

the hearing in this case, Mr. Phillips entered the Galen State Hospital for alcoholic treatment as a result of his alcoholic problem. During the period of time the minor child has been in the foster home, Mr. Phillips has also resided there simultaneously.

DATED this _____ day of June, 1981.

Calvin J. Stacey
{attorney for respondent}

W. Corbin Howard, Deputy County Attorney

Damon L. Gannett
{Guardian Ad Litem}

APPENDIX S (Typed Copy)

STATE OF MONTANA, OFFICE OF THE GOVERNOR

HELENA, MONTANA 59620

406-444-3111

May 23, 1988

Frank Boring Fitzgerald

3000 Hallowell Lane

Billings, MT 59101

Dear Mr. Fitzgerald

I referred your letter of April 13, 1988, to Gene Huntington, Director of the Department of Family Services. After investigating your concerns, Mr. Huntington found that the sexual abuse complaint involving your daughter was handled in accordance with accepted policy and procedures.

Mr. Huntington indicates that initially, while your daughter remained in the foster home, the perpetrator voluntarily removed himself from the home. After

obtaining professional opinions from everyone involved, it was determined that, because of her attachment to the foster parents, maintaining the relationship between your daughter and her foster family was in her best interests. The perpetrator only returned to the home upon the agreement of all professionals involved that his return would not place her at risk. The Department of Family Services' duty was to protect the child and Mr. Huntington indicates that was done.

Any decision to prosecute rests with the local county attorney, to whom I understand you have also written. You should address additional questions or comments to Mr. Huntington.

Sincerely,

Sig: TED SCHWINDEN, Governor

APPENDIX T

OFFICE OF COUNTY ATTORNEY, MISSOULA COUNTY
COURTHOUSE, MISSOULA, MONTANA 59802
406-721-5700 May 27, 1988

Frank B. Fitzgerald
3000 Hallowell Lane
Billings, Montana 59101

Dear Mr. Fitzgerald,

I am in receipt of your materials of May 25, 1988. I reviewed them as well as the investigation files I had initially examined this year.

I am satisfied with my earlier decision not to prosecute since this matter appears to have been adequately resolved without any need for a criminal prosecution.

Sincerely,

Sig: Robert L. Deschamps, III
MISSOULA COUNTY ATTORNEY

RLD/jl

Supreme Court, U.S.
FILED
JUN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1582

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1987

FRANK BORING FITZGERALD, Appellant,

V.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

SUPPLEMENTAL BRIEF

FRANK BORING FITZGERALD,
3000 Hallowell Lane
Billings, Mt 59101
406-259-5866
Appellant, Pro Se

QUESTION PRESENTED

Question raised by Appellees: Whether Appellant has exhausted his state remedies available to him. New information.

TABLE OF CONTENTS

AUTHORITY CITED.....i

QUESTION RAISED.....1

ARGUMENT.....2

CONCLUSION.....5

PRAYER.....6

AUTHORITY CITED

LOWER COURT CASE

FITZGERALD V. STATE OF MONTANA, ET AL,

DV 88-726(7) (JUNE 10, 1988).....2

No. 87-1582

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

FRANK BORING FITZGERALD, Appellant,
V.
STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director, Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

SUPPLEMENTAL BRIEF

Pursuant to Rule 16.6, Appellant, FRANK BORING FITZGERALD, Pro Se, files his SUPPLEMENTAL BRIEF calling attention of this Court to intervening matters, entered in the Appendices, not available at the time of Appellant's last filing.

QUESTION RAISED

Appellees raised the question in their MOTION TO DISMISS, at page 6, "...nor shown that no state remedies are available to him."

That question was answered in part in Appellant's BRIEF OPPOSING MOTION TO DISMISS, at page 19 in parentheses, "(Appellant currently seeks a state Writ of Mandate...)"

That action, PETITION FOR A WRIT OF MANDATE, DV 88-726(7), has now been both filed, App. 284-312, and denied, App. 313-316, in Montana's 13th Judicial District Court. Both the filing and denial are new and significant developments intervening since the last filing in this Court of Appellant's papers.

ARGUMENT

This case is an ongoing one for the past 9 years. The QUESTION above raised and addressed, is tied to Questions raised in Appellant's Jurisdictional Statement. Particularly, Questions 3 and 8, which point to the larger question of State's ability to have, unconstitutionally, harmed and continues even now to harm Appellant's parent-child relationship

where his Parental Rights have not been conclusively terminated, thru acts of commission and/or omission by persons acting for and in behalf of the State. That harm was earlier demonstrated by several documents in Appendices G, M, O, P, Q, R, S, T, and now V.

And now the latest insult to injury, the denial of a Writ of Mandate by the state lower court to extract Appellant's child from her abuse and neglect at the hands of the State. Impossible to remedy?

Yes, the State can and does occasionally create conditions, foster-care, in which child abuse and neglect take place. Short of war, there are no easy remedies available to fight the State wrong in the case of sexual assault upon Appellant's child by confessed foster-care father. That is because those in the power structure adhere to the premise, "the State can do no wrong." And now Appellant's child believes that with all her might. Admit-

ting no wrong in the presence of documented wrong, the State continues to insist no wrong has been committed for which anything other than implementing State policy need be effectuated. In other words, "coverup".

The QUESTION must be asked, if the child were similarly sexually assaulted in a non-foster-care family, would the protection of the child be to remove the child and to punish the perpetrator? In Montana, the answer is clearly yes, Appellant having seen it many times in the media.

But because the subject family is a foster-care family, it appears to have blanket immunity! While in foster-care, the law in Montana does not protect the child as much as it protects the State from harm of adverse attention and direction.

When the State is the one doing harm to the child and to the parent-child rela-

tionship, it cannot continue to claim supreme sovereignty. Who is to right the State wrong?

Appellant believes this system of foster-care, secrecy surrounding it and the State's ability to shape events as personnel want to, needs ending and replacement. It starts with a different set of State personnel attitudes, values and direction.

CONCLUSION

Appellant, contrary to argument of Appellees, is exhausting state remedies as each development requires a different approach.

Federal and constitutional questions raised by Appellant are still within this Court's jurisdiction to resolve.

Child abuse and neglect, caused by foster-care, may appear on the surface to be a matter only for state resolution. But effects of the foster-care sexual assault have impacted so badly Appellant's child, and his parent-child relationship, not

terminated, it amounts to termination and adoption. And that means infringement of his Constitutional Rights. It is absent immediate state remedies, without redress of grievances, and, without due process.

PRAYER

Appellant prays this Honorable Court grants his Appeal, or in the Alternative Court One, Petition for a Writ of Certiorari, or, Count Two, Petition for a Writ of Habeas Corpus as presented in Appellant's Jurisdictional Statement modified hereby with new and significant matters herein which are material to this case.

Respectfully submitted,

Dated June 16, 1988

Frank Boring Fitzgerald

Frank Boring Fitzgerald
Appellant, Pro Se
3000 Hallowell Lane
Billings, Mt 59101
406-259-5866

(APPENDICES U, V FOLLOW)

AFFIDAVIT

STATE OF MONTANA)

) SS.

County of Yellowstone)

FRANK BORING FITZGERALD, Appellant, Pro Se, being first duly sworn, hereby deposes and says:

He has personally prepared and read his SUPPLEMENTAL BRIEF, in his Appeal 87-1582.

He certifies, in his judgment, matters raised are well founded and contribute to a better understanding of the case.

Frank Boring Fitzgerald

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 16th day of June, 1988.

Notary Public in State of Montana

Residing in Billings, Montana

My Commission Expires 5/.../..

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) SS.
County of Yellowstone)

FRANK BORING FITZGERALD, Appellant, Pro Se, being first duly sworn, hereby deposes and says:

He has personally served, via prepaid first class mail, his SUPPLEMENTAL BRIEF in his Appeal 87-1582, on the following persons known to be of interest in this APPEAL.

For Appellees:

HON. MICHAEL T. GREELY, Attorney General
*CLAY R. SMITH, Assistant Attorney General
State of Montana, Justice Building, 215 North Sanders, Helena, MT 59620-1401
406-444-2026.

RANDI M. HOOD, Special Assistant Attorney General, State of Montana, 48 North Last Chance Gulch, Helena, Mt 59601 406-444-5900.

With copy to:

Damon L. Gannett, Guardian Ad Litem, 720 North 30th Street, Billings, Mt 59101-0097 406-245-6338.

And, with copy to:

Ralph L. Herriott, Former Counsel for Appellant, 315 North 24th Street, Billings, Mt 59101. 406-248-7110

* Counsel of Record

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 16th day of June, 1988.

Notary Public in State of Montana
Residing in Billings, Montana
My Commission Expires 8-1-88

(APPENDICES U, V FOLLOW)

APPENDICES U, and V

U...PETITION FOR A

WRIT OF MANDATE.....App. 284-312

V...ORDER DENYING

WRIT OF MANDATE.....App. 313-316

APPENDIX U (Typed Copy)

Ralph L. Herriott
315 North 24th Street
Billings, Montana 59101
tel. (406) 248-7110
Attorney for Petitioner

MONTANA 13TH JUDICIAL DISTRICT,
YELLOWSTONE COUNTY

FRANK B. FITZGERALD, Petitioner, vs. THE STATE OF MONTANA, acting by and through HAROLD HANSER, the County Attorney in and for Yellowstone County: DEPARTMENT OF FAMILY SERVICES, an agency of the State of Montana; and JOHN DOE I, JOHN DOE II, JOHN DOE III, and JOHN DOE IV, representatives and employees of the Department of Family Services of the State of Montana, and DAMON GANNETT, Guardian ad litem of Margaret Geraldine Moore, a minor child, Respondents	Cause No. 88-726 JUDGE: G.TODD BAUGH

PETITION FOR WRIT OF MANDATE

PETITIONER, FRANK B. FITZGERALD, for cause of action alleges as follows:

I.

These proceedings are instituted pursuant to the provisions of Title 27, Chap-

ter 26, Sections 27-26-101, et. seq., of the Montana Code Annotated for the reasons and upon the ground set forth herein, as well as the reasons set forth in the accompanying affidavits filed herein and upon the further ground that Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, and for cause for his petition the Petitioner alleges as follows:

II.

Petitioner is the natural father of Margaret Geraldine Moore, a minor child of the age of 15 years; Petitioner has never by Court Order, or otherwise been deprived of his rights as the natural father of the said minor child.

III.

The custody of Margaret Geraldine Moore, minor child above-mentioned has in the past been the subject matter of Cause No. DJ-79-188, of this Court and Cause No. 86-538 of the Supreme Court of the State

of Montana. This Court retains jurisdiction over the person of the said minor child and the subject matter of the custody of the said minor child, as appears in said proceedings. Yellowstone County is the domicil of the said minor child.

IV.

In the proceedings set forth above, the custody of the minor child was awarded to the State of Montana; that the Department of Family Services is an agency of the State of Montana enjoined by law to administer the care, custody and control of minor children adjudicated youth in need of care; that the Department of Family Services places children within its jurisdiction in foster homes chosen and administered by the Casey Foundation and the said Casey Foundation has at all times acted as an agent for the State of Montana as regards these proceedings and the custody of the said minor child.

V.

That the Casey Foundation, with the approval and consent of the Department of Family Services placed the said minor child in the foster home of Kenneth and Marilyn Curtis, whose address is 81 Lacota Drive, Missoula, Montana, where, on or about the 19th day of December, 1987, or prior thereto, the said minor child was sexually assaulted by Kenneth Curtis, who has admitted to commission of the said offense.

VI.

That prior to the placement of the minor child in the Curtis home, the said minor child had been placed in a foster home wherein there existed an environment of acute case of alcoholism and where the said minor child was threatened with fire-arms and otherwise abused.

VII.

That heretofore, Damon Gannett has been appointed by this Court as the

Guardian ad litem of the said minor child and was such guardian at the time of the sexual assault set forth herein.

VIII.

That Margaret Geraldine Moore is an abused and neglected child within the meaning of Sections 41-3-101 and 41-3-102, MCA, and the facts constituting the abuse and neglect have been known by all of the Respondents since January, 1988. That the Department of Family Services is required by the provisions of Section 41-3-302, MCA and the guardian ad litem is required by provisions of Section 41-3-303 to take action for the protection of the said minor child, but notwithstanding that the said state agency and guardian ad litem have had actual knowledge of the sexual assault, no action has been taken by either, in spite of the fact that the Petitioner has so requested as is more particularly set forth in the affidavit of Petitioner, which is incorporated herein by this ref-

erence as though fully set forth herein and which also particularly appears in the affidavit of Petitioner's attorney which is incorporated herein by this reference as though fully set forth herein.

IX.

That Harold Hanser is the duly elected qualified and acting county attorney for Yellowstone County and is required by the provisions of Section 41-3-401, MCA for filing petitions regarding the abuse of minor children. That Yellowstone County is the domicil of the said minor child.

X.

That notwithstanding actual knowledge of the Respondents of the sexual assault upon the minor child, as herein alleged, the minor child remains in the foster home where the said sexual assault occurred and no action has been taken to remove the minor child from an environment which is detrimental and injurious to growth and development of the said minor child.

WHEREFORE, the Petitioner prays that this Court issue a Writ of Mandate requiring the Respondents to remove the minor child from her present environment and placing the said minor child in a suitable environment, preferably the home of her natural father, or in the alternative, to appear and show cause at a time and place certain why the Respondents have not done so, and for such other relief as is appropriate in the premises.

Signature: Frank B. Fitzgerald

STATE OF MONTANA)
: ss
County of Yellowstone)

FRANK B. FITZGERALD, sworn upon his oath deposes and says: That the allegations of the within and foregoing Petition are true to the best of his knowledge, information and belief.

Signature: Frank B. Fitzgerald

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: Ralph L. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires Oct. 13, 1988.

(NOTARIAL SEAL)

(Typed Copy) {Marked}

A F F I D A V I T 88 726

STATE OF MONTANA)
: ss
County of Yellowstone)

Frank B. Fitzgerald, being of lawful age and first being duly sworn upon his oath deposes and says: That he resides at 3000 Hallowell Lane, Billings, Montana. That he is married and that his wife's name is Velma Fitzgerald and that she resides with the affiant at the address above. That he is the natural father of Margaret Geraldine Moore. That his daughter now resides with Ken and Marilyn Curtis in Missoula, Montana. That the State of Montana now has custody of Margaret Geraldine Moore as a result of a Court Order in cause number DJ-79-188 in the District Court of the 13th Judicial District of the State of Montana in and for the County of Yellowstone.

That in the month of January, 1988, affiant was informed by George Bulatowicz

that affiant's daughter had been sexually assaulted by Ken Curtis, foster father.

Thereafter the affiant made attempts to have his daughter removed from the Curtis Foster Home where she had been placed by the Casey Foundation, an agent of the Department of Family Services of the State of Montana as is set forth in the correspondence from affiant to George Bulatowicz.

That thereafter and on or about the 25th day of February, 1988, the affiant received a letter from the Department of Family Services of the State of Montana.

That a copy of the letter from affiant to the Department of Family Services is attached hereto. That the letter from the Department of Family Services to affiant is attached hereto.

That thereafter the affiant received a letter from his daughter dated February 17, 1988. That affiant believes that the letter written by his daughter is the

result of the influence of the environment in which she is now placed. A copy of said letter is annexed to this affidavit.

Affiant believe that the environment in which his daughter has recently been placed and which has been placed in the past by the Department of Family Services is not conducive to the proper and healthy development of his daughter but rather is detrimental to her best interests.

Signature: Frank B. Fitzgerald

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: Ralph L. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires Oct. 13, 1988.

(NOTARIAL SEAL)

(Typed Copy)

[Letter attached to Affidavit]

Frank B. Fitzgerald

3000 Hallowell Lane

Billings, Mt 59101

259-5866

January 24, 1988

George Bulatowicz

Social Worker

Department of Family Services

3021 - 3rd Avenue North

Billings, Mt 59101

Re: In Re: M.G.M., DJ-79-188, 13th Judicial District; In Re: M.G.M., 86-538, Mt.Sup.Ct.; In Re: Fitzgerald v. Department of Family Services, et al., US Supreme Court.

Dear Mr. Bulatowicz:

This letter covers several matters in regards my daughter Margaret Geraldine Moore. Please note the parties listed at the end receiving a copy of this letter.

It is to them some of these matters are addressed altho you should be aware of the implications, for your handling of the case as a social worker.

Please accept my very grateful thanks for first inviting me to your office at 1:30P, January 22, 1988 and then forthrightly telling my wife, Velma, and me, of my daughter's plight at the hands of the foster care father, Ken Curtis. It was stressful news I did not expect. We feel for our child. As I remember it, this is the very first time in nearly 9 years the state has told me anything happened in foster care to Margaret of detriment to her and our parent-child relationship. I have had to learn clandestinely of other harm to Margaret while she was in foster care from extra agency sources to avoid the Attorney General's secrecy rule.

If I understand correctly, Ken Curtis did enter Margaret's bedroom and did touch her breasts on or about December 19, 1987;

and that he did admit to having done this; and that he no longer lives in the Curtis home at 81 Lacota Dr., Missoula; and that there are pending proceedings in Missoula involving the incident. If any proceedings are to take place or have taken place, those records and reports, as they pertain in any regard to Margaret, should likewise be made a part of this Court's file, DJ-79-188. That is because this Court retains jurisdiction over all matters, things and persons in regards this case evidenced by expression number one of the Court Order of September 2, 1986.

Please repeat to us in writing of the above incident and forward to us any information pertaining to Margaret as it becomes available. The Court here must of course be made aware of goings on in Missoula. Since this case is going on appeal to the US Supreme Court as noted above, the Attorney General must also be made aware. And, I want the Montana Su-

preme Court Chief Justice Turnage to personally be made aware of this latest incident. It is new and significant information and pertains to cause 86-538. It implements my pro se filed prayer to Turnage citing the Phillips Notarized Statement, mentioned below. That prayer has not yet been acted upon and is current.

From what you said, Margaret did not want me, her father, to know of the above incident. I do not know her reasons for this. We, of course, as her parents do have the need to know. I do think it important she could and should feel free to tell me, herself, personally, so we can talk if appropriate; that is partly what fathers are for, something she lost to foster care. She should be given encouragement to do this by those in position within the system. We want her to let us know her feelings so as to be of help to her.

Margaret has no reason nor any need to protect Ken Curtis from me. She surely has no reason to protect him as a father figure. Rest assured, there will be no violence from me. I do want to stress, all of the foster care abuse and neglect created by the system these 9 years, fostered by the system upon Margaret while she has been in foster care, I treat as an affront, and a clear danger to her, and to our parent-child relationship. It is the state's manufacturing of historical events detrimental to the best interests of our child. I will attempt to protect the legal parent-child relationship in every way I can.

We as parents are aghast, this was allowed to happen in foster care to our child and to us, for an injury to our child is an injury to us. Ever more so now, the best interests of our child clearly lies first and foremost with us her human family not with parens patriae.

My presumption is Ken Curtis had ulterior motives in his affront to my daughter's person, dignity, pride, self-esteem, and her image of what fathers are all about.

My wife and I love our daughter, want to protect her, give her a good start in life; that is what we are all about but your stinking rotten inhuman system has prevented that love she needs being received by her because of interference by foster care counselling her, such as the Curtis counselling, not to accept our love, only the Curtis kind.

I am proud of my daughter for having the guts to face up to Ken Curtis and finally say "no"; and, to report it.

I want to state for the record, I and my wife regret this incident ever happened. We feel compassion and hurt for our child and we will do everything we can within the law to help her.

However, we disclaim any legal responsibility, otherwise coming under statutory requirement of parental protection of the child, for this or any other incident which has occurred to Margaret while she was in foster care. Under circumstances of foster care, it was impossible for us to have prevented this or any other incident with her in Missoula 300 miles away. As you know, her physical custody, assigned by court order, approved by Montana's Supreme Court, has been in the hands of Casey Foundation's Casey Family Program, the private agency, and in the hands of the Curtises who themselves were not adequately investigated.

My objective for Margaret is to settle her into my family here in Billings as quickly as possible. Either we, and/or sources we pick, will provide her with adequate implementation of whatever she needs, bearing in mind she has had it up to here with "counseling, poking and pry-

ing" by professionals and the so-called counsellors, the Curtises. With us her family she will be able to express herself, where in the Curtis foster care she was not. She will have input with us. Margaret is reported, long before the present incident, to have confided in a friend, she felt she was like, in a "prison" in her situation in Missoula.

As any father would be, I am clearly angry any man would dare to muster such an incident. My anger extends to all those responsible for placing my daughter in such a situation for a second time and for such a long time.

My tolerance for this inhuman system is at an end. I now have to lay it out for system promoters I will accept no more legally sequestered incidents of abuse upon my daughter, her having been previously exposed to abuse by Phillips foster care in the form of alcoholism, gun shot, threatened with a loaded gun, running for

their lives; and, seeing before her eyes, a second foster family disintegrate. I will blow the whistle.

First, I bring to your attention the Phillips "Stipulation" on {his} alcoholism of June 1981; it is of record.

Second, the Phillips "Notarized Statement" is now contained as Appendix G attached to my Jurisdictional Statement filed in US Supreme Court and was included as an exhibit to a plea for a Stay Order to Chief Justice Turnage on September 24, 1987.

Third, because of its implications, I will submit to the US Supreme Court, a supplemental brief containing the essence and meaning of this latest in a series of foster care incidents.

A delay in the US Supreme Court could be asked for pending filing of further pleadings in Montana's Supreme Court in the form of a Petition For a Writ of Re-

view on the basis of this and other new and significant evidence.

For the limited purpose of a delay in the US Supreme Court and a Petition For a Writ of Review at the Montana Supreme Court level, I would hope there would be no opposition from either the Attorney General, the County Attorney, or Guardian Ad Litem.

If a TIA was served upon Ken Curtis, it must be also served together with appropriate documents, upon me as I am still Margaret's legal custodian, parental rights having been preserved in the court order of September 2, 1986, affirmed in 86-538 Mt.Sup.Ct. on August 20, 1987, rehearing denied on September 17, 1987.

By court order of September 2, 1986, Margaret was placed in the Curtis foster care home until she becomes 18. Therefore she can not be transferred at this time to another foster care home without further proceedings to which I am a party.

This is not to say I and my wife want our daughter to remain in the Curtis home or in any other foster care home. To the contrary, we absolutely want her out of that or any other foster care situation all of which I feel is detrimental to Margaret and to our parent-child relationship. My demand is that she be returned to us her rightful family where none of these child abuse incidents could or would ever take place.

We allege, the two foster care home providers, Phillips and Curtis, were not given as much attention as we were given by the system when it came to placement of Margaret. We were treated as adoptive parents instead of family thru use of a false state doctrine which dictated, long before parental rights are conclusively terminated on point of unfitness, foster care is the best interests of the child and foster care is the primary goal not keeping the family together. That is what

this case is all about and system promoters want to preserve their niche at the expense of our normal parent-child relationship.

Because this is the second foster care home abuse of our child to surface, we hereby allege and charge, the Attorney General's denial of parental access to department secret files permitted a coverup of state induced trauma to our child; and, a sufficient and significant doubt is cast upon the Stipulation in this case of August 13, 1986, upon limitations on parental rights and due process the Stipulation represents, and, upon Dr. Richard Agosto's Report, Affidavit, and testimony from the standpoint of limited guidelines of evaluation imposed by Casey upon him to exclude looking at effects of longterm foster care trauma being a detriment and deterrent to our parent-child relationship, failure to adequately take into account our daughter's foster care con-

ditioning, exposure of our child to child abuse and neglect while in foster care, lack of adequate investigation of foster care providers, and other parameters, and the fact his {Dr. Agosto} "bills" were paid for by the Casey Foundation who had physical custody of our child.

Because of the above and much more, we will seek to reopen this case with the intention of obtaining full and uninterfered with custody of our child; by rescission of the court order of September 2, 1986; by court ordered return of Margaret to us her true family. If she needs treatment of any kind or nature, we will get it for her on the condition it is our choice and doctor-client confidentiality will prevail to the extent the doctor has nothing to report to the state under statutory mandatory reporting of incidents of child abuse and neglect; and, such evaluations, counseling, or treatments will

remain confidential only to our family and not to the state or other persons.

Further, the system stands exposed to investigation. We of course would cooperate and seek an independent special prosecutor.

In addition to a state independent investigation, because Federal statutes, USCS Title 42-601 et seq., at several points allegedly have been disregarded, and USCS Title 42-1983 allegedly was violated, I would think the US Attorney would be most pleased to receive a complaint and perhaps call for the Federal Grand Jury to convene on this matter.

Signature: Frank B. Fitzgerald

cc: Clerk of Court, US Supreme Court
Chief Justice Jean Turnage, Mt.Sup.Ct.
Clerk of Court, Mt.Sup.Ct.
US Attorney, Billings, Mt. District
Judge Speare, 13th Judicial District
Director, Court Services, 13th Dist.
Hon. Mike Greely, Attorney General
Harold Hanser, County Attorney
Greg Mullowney, Dep. County Attorney
Damon Gannett, Guardian Ad Litem
Ralph Herriott, Attorney

{Attached next was letter dated February 25, 1988, from DFS Legal Counsel, Randi Hood, which may be found at App. 196-197 in the BRIEF OPPOSING MOTION TO DISMISS.

{Attached next was letter dated February 17, 1988 from MGM addressed to Mr. and Mrs. Frank Boring Fitzgerald and one scribbled addressed to "Dere Velma". Those MGM letters were in an envelope addressed to Frank Boring and Mrs. Velma. Return addressed in the name of Margaret Ann Curtis. These may be found at App. 250-255 in the BRIEF OPPOSING MOTION TO DISMISS.}

(Typed Copy) {Marked}

A F F I D A V I T 88 726

STATE OF MONTANA)
: ss
County of Yellowstone)

Ralph L. Herriott, being of lawful age and being first duly sworn upon his oath, deposes and says:

That he is legal counsel for Frank B. Fitzgerald. That Frank B. Fitzgerald is the natural father of Margaret Moore. That Margaret Moore resides in Missoula, Montana in the home of Ken and Marilyn Curtis, which home and persons has been selected as the foster home for Margaret Moore by the Casey Foundation, which is acting as a{n} agent for the State of Montana by and through the Department of Family Services.

That the affiant was informed by Frank B. Fitzgerald and George Bulatowicz, an employee of the Department of Family Services that Margaret Moore had been sexually abused by Ken Curtis late in the year 1987. That the affiant made further in-

quiry into this matter and was informed that such sexual abuse had in fact occurred. Whereupon the affiant made request upon Shirley V. Tiernan, Social Worker III of the Missoula office of the Department of Family Services and was furnished with the report of the investigation into the matter of the sexual abuse of Margaret Moore by such department and that said report is annexed hereto in its entirety.

Signature: Ralph L. Herriott

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: M. E. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires 12-16-90.

(NOTARIAL SEAL)

{Attached next was letter dated February 29, 1988, from Shirley V. Tiernan, Social Worker III, Missoula DFS addressed to Ralph Herriott concerning the Curtis/Moore case, which letter may be found at App. 198 in the BRIEF OPPOSING MOTION TO DISMISS.}

{Attached next was the complete DFS developed file on the Curtis/Moore case sent to Ralph Herriott at his request acting for and in behalf of Appellant Frank Boring Fitzgerald. That DFS file can be found at App. 199-249.}

APPENDIX V (Typed Copy)

MONTANA 13TH JUDICIAL DISTRICT,
YELLOWSTONE COUNTY

FRANK B. FITZGERALD, Petitioner, vs. THE STATE OF MONTANA, acting by and through HAROLD HANSER, the County Attorney in and for Yellowstone County: DEPARTMENT OF FAMILY SERVICES, an agency of the State of Montana; and JOHN DOE I, JOHN DOE II, JOHN DOE III, and JOHN DOE IV, representatives and employees of the Department of Family Services of the State of Montana, and DAMON GANNETT, Guardian ad litem of Margaret Geraldine Moore, a minor child, Respondents	No. DV 88-727 {726} ORDER DENYING WRIT OF MANDATE

Petitioner seeks to have this court issue its Writ of Mandate to respondents ordering them to initiate such action or institute such proceedings as are appropriate and necessary to have Margaret Geraldine Moore adjudicated a youth in need of care, remove her from her present environment in the Curtis foster home and place her in a suitable environment, to-

wit: the home of Frank B. Fitzgerald, her father and petitioner.

There are a number of reasons why it is not proper to grant the writ. First, a writ of mandate only lies for acts specifically set out by statute. A person subject to writ of mandate must be able to read a statute and perceive a specific and clearly stated act or function he is to perform. In other words, a clear and direct mandate from the legislature. Those more nebulous and non-specific legislative directives that delegate discretionary powers are not subject to writ of mandate.

Petitioner cites M.C.A. 41-3-401 as the mandate he would have this court enforce but there is no legislative directive there specific enough to enforce by writ of mandate.

Second, part of what petitioner seeks has already been done: Margaret Geraldine Moore has already been adjudicated a youth in need of care in DJ-79-188. In fact the

Department of Family Services and its predecessors have been involved with this family since 1979 and petitioner and his current attorney, Ralph Herriott, have already been to the Supreme Court on this case in years past. In this Court's opinion, the appropriate place to bring petitioner's current concerns to light is within the context of that proceeding and not in a totally new action, especially where the new court is not advised of the previous eight years of interaction with the Department of Family Services.

Third, as pointed out in the Supreme Court opinion in DJ-79-188, without some showing of significantly changed circumstances, placement of the youth with petitioner would seem quite inappropriate. Without some explanation, this Court is surprised that petitioner would even suggest that placement with him might be appropriate.

Fourth, this Court is aware from the allegations contained in the petition and supporting affidavits that there is some good reason to be concerned that the Curtis foster home is an appropriate placement. However, the petition also reveals that the Department of Family Services and the guardian ad litem are also aware of the basis for petitioner's concern and are apparently addressing that problem in an appropriate manner. If petitioner disagrees, the correct proceedings for him to bring his concerns to be aired is the youth court proceedings already begun in 1979.

Wherefore, IT IS ORDERED that the petition for writ of mandate be and hereby is DENIED.

Dated this 10th day of JUNE, 1988.

Signature: G. TODD BAUGH, District Judge

cc: Ralph Herriott
Greg Mullowney
Department of Family Services
Damon L. Gannett
Hon. William J. Speare

CERTIFICATE OF SERVICE